TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1630

THE STEAMSHIP "WESTERN METROPOLIS," HER TACKLE, &c.; HIRAM BENNEE AND LEMUEL BROWN, CLAIMANTS, APPELLANTS,

vs.

THE SCHOONER "MARY C. TOWN;" BENJAMIN F. TOWN ET AL., CLAIMANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 8, 1859.

SUPREME COURT OF THE UNITED STATES.

No. 408.

THE STEAMSHIP "WESTERN METROPOLIS," HER TACKLE, &c.; HIRAM BENNER AND LEMUEL BROWN, CLAIMANTS, APPELLANTS,

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1 In admiralty.—United States district court, S. D. of New York.

To the Honorable Samuel R. Betts, district judge of the United States within and for the southern district of New York:

The libel and complaint of Benjamin F. Town, John F. Fox, Fountain M. Crammer, James Anderson, Daniel S. Williams, Mary A. Woolston, Charles Allen, Henry Howell, William Lane, Tunis Bodine, and Michael Allen, owners of the schooner Mary C. Town, of Waretown, New Jersey, in a cause of maritime tort, as follows, to wit:

Firstly. That they, the said several libellants, are the owners of the said schooner Mary C. Town, which is a vessel engaged in the coasting trade, and the said owners are residents of the State of New Jersey; that the said steamship "Western Metropolis" is a vessel belonging to and sailing out of this port to New Orleans and other places, and is at present within the admiralty and maritime jurisdiction of this honorable court, to wit, in the said port of New York.

2 Secondly. And these libellants do further allege and propound that on or about the night of the 10th day of February, 1864, and within the admiralty and maritime jurisdiction of this honorable court, to wit, on the tide-waters of the Potomac River, their said schooner was run against and collided with by the steamship Western Metropolis, so that she filled and immediately sank, occasioning your libellants great damage in raising and repairing her, and in her loss of service.

Thirdly. That the circumstances of the said collision are as follows, to wit:

Your libellants' vessel was coming down the Potomac on the night of the said 10th of February, 1864, with all her sails set, and with a fair breeze from the northward, say about 7 knots an hour. The schooner was bound down the river to New York, and was light. She had on board a master, John T. Fox, one of the libellants, and a mate and a crew of four persons, all experienced in the business, of whom five were on deck, three forward on the look-out, and two at the helm. When on a course of about S. E. by east ½ east, the wind bearing on the

3 larboard side of the schooner, about ten minutes before 8 o'clock p. m., she descried the steamship Western Metropolis about two miles off, coming up the river, bearing in a direction towards the schooner, and off the schooner's port bow, under full headway; that is to say, about 14 miles an hour, and bound on a course which would bring her to the windward of the schooner. This was about two miles above and westward of Blackstone's Island and light-house, and as near as may be in the middle of the river, which in that vicinity courses from west-northwest to east-southeast a little winding, and the river there was about two miles wide.

If the steamer had kept on her course at that time, no collision would have occurred, as she would have passed your libellants' vessel to the windward. Instead of doing so, however, so kept closing in gradually on the track of the schooner until she was aiming in nearly a direction to cross the schooner's bows, the schooner keeping her course all the time; and when the steamer had approached within 500 yards off from the schooner, they suddenly blew one whistle,

4 which is a signal usually given to sailing vessels to go to the right; and your libellants' vessel, in keeping her course, was keeping to the right, which the steamer could readily perceive, when the steamer, instead of following the direction of her signal, starboarded her helm, and came right down on the schooner, and struck her bow on

nearly amidships, a little abaft of the main chains, and cut her right down, and sinking in twenty minutes in about five fathoms of water.

That if the steamer had slowed, stopped, and backed in time, and at the same time ported her helm instead of starboarding it, the collision would have been avoided; or even if the steamer, at the time she blew her steam-whistle, ported her helm instead of starbording it, the collision would, as these libellants believe, have been avoided; or if the steamer had slowed, stopped, and backed, or even slowed & stopped her headway a reasonable time before the collision, the same would have been avoided; or even, as these libellants believe and so aver, the said steamship had refrained from blowing her steam-whistle as a signal to these libellants' schooner to go to the right, and had instead thereof herself ported her helm instead of starboarding it, the collision
5 would have been avoided. At the time of the collision objects on the water could be readily decried at a distance of more than two miles, there being a little moonlight.

Fourthly. And these libellants do further aver that the said collision was solely the result of the negligence and want of skill of those in charge of the said steamship, and particularly in the inexperience and mismanagement of the captain of the said steamship, who persisted in starboarding the helm of said steamship, after the mate of their vessel, who was forward on the look-out, had warned him it was proper to put their helm hard aport, in order to avoid a collision with the schooner; and your libellants' vessel did not alter her course at all until after the said vessel had blown her steam-whistle, and then only to avoid the collision she put her helm up; the result of which was she came near escaping the blow of the steamer; but if the steamer had not done so, she would have hit the steamship, and probably sunk her; that, owing to the wind, the schooner could not have, prior to the collision, starboarded her helm without running the risk of coming up into the wind and being

6 Fifthly. That immediately after the said collision the said steamship went on, and rendered no assistance to your libellants' schooner, so that she sank five fathoms of water as aforesaid. And your libellants have sustained the following damages by the said collision, to wit: They have been compelled to raise the said schooner, and repair and put her in the same condition she was in before, which cost them about six thousand dollars. They also lost the use of the said schooner ever since the said collision and up to the present time, and will lose that use for about ten days hence, when all of said repairs will be entirely finished, being in all about two months and fifteen days; the reasonable value of which use is $25 per day, in all $1,875, making a grand total of their damages $7,875, which they claim by this their suit, and which the owners of said steamship wholly refuse to pay to your libellants.

Lastly. And your libellants do allege that all and singular the aforesaid matters are true, and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore your libellants pray that they may have a decree
7 of this honorable court condemning the said steamship for the damages and costs aforesaid, and the costs of this suit; and that in the meantime, and before said decree, that a process of attachment may issue against the said steamship, her tackle, engines, boilers, apparel, machinery, and furniture, and that the owners thereof, and all other persons interested therein, may be cited to appear and answer concerning the matters aforesaid, and to interfere for their said interest;

and that your libellants may have such other or further relief in the premises as may seem meet to the said court then and there. And your libellants, as in duty bound, will ever pray, &c.

B. F. TOWN.
CAPT. JOHN T. FOX.
his
F. M. + CRAMNER,
mark.
For other owners above named.
JOHN F. FOX, *Master.*

D. & Y. MCMAHON,
Proctors, Libellants' Advocates.

Sworn to before me this 7th day of April, A. D. 1864, by John F. Fox, one of said libelants, who is also master therof.

T. EASTNER BENNETT,
Notary Public, N. Y. City.

Resworn to before me this 7th day of April, 1864.
[SEAL.] A. C. WILMARTH,
Notary Public, New York.

[U. S. rev. stamp, 6 c., can'l.]

8 (Endorsed:) In admiralty. U. S. district court, S. D. of New York. Benjamin F. Town, John T. Fox, Fountain M. Cramner, James Anderson, & others, ag't the steamship Western Metropolis. Libel, with proposed amendments. D. & T. McMahon, proctors libellants & advocates.
Filed April 13th, 1864.

9 United States district court.

STEAMER WESTERN METROPOLIS *ads.* BENJAMIN F. TOWN.

Exceptions taken by the claimants herein to the libel filed in the above action.

First at issue. That the said collision alleged and set forth in the libel occurred in either the eastern district of Virginia or the district of Maryland, and out of the southern district of New York, and that this court have not jurisdiction thereof.

Do. second. That the libel does not state or set up facts or a cause of action within the jurisdiction of this court.

Do. third. That the libel does not set up or state the point from which the wind blew at the time of the collision with certainty.

Fourth. That the statement in the third article of the libel, "the wind being on the larboard tack," is improbable and unintelligible.

At issue fifth. That the libel does not state how far the vessels were apart when the steamer was seen from the schooner.

Do. sixth. That the libel does not state which side of the middle of the river either vessel was, or how far from either
10 shore either vessel was when the steamer was first seen.

Do. seventh. That the libel does not set up or allege what course the steamer was on when first discried.

Do. eighth. The said libel does not allege what change of heading, if any, the steamer made.

Do. ninth. That the libel does not state how far off the steamer was when she so headed across the schooner's bow.

Do. tenth. That the libel, while undertaking to show light enough to see objects at a distance, does not state what distance they could be seen at.

Eleventh. That the statement of the libel in the fourth article that "she (the schooner) put her helm up in the wind," is impossible and unintelligible.

BEEBE, DEAN & DONOHUE.

(Endorsed:) U. S. district court. The steamer Western Metropolis ads. Benjamin F. Town. Exceptions. Beebe, Dean & Donohue, for claimants.
Filed May 10th, 1864.

11 In admiralty.—United States district court, southern district of New York.

BENJAMIN F. TOWN AND OTHERS
versus
THE STEAMSHIP WESTERN METROPOLIS.

At a stated term of the district court, held at the United States court-rooms, in the city of New York, on Wednesday, the 29th day of September, 1864:

Present, Hon. S. R. Betts, D. J.

On reading and filing affadavit of Dennis McMahon, and notice of motion to amend libel in divers particulars, and after hearing Mr. McMahon for the motion, and Mr. Donohue oppossed, it is ordered that the libel filed in this cause be amended in the following particulars, to wit: After S. E. by east ½ east, in the third allegation of the libel, erase the words, "the wind being on the larboard tack," and insert in their place, in lieu thereof, the following, viz: "the wind bearing on the larboard side of the schooner." Also in the same third allegation, after the words, "she descried the steamship Western Metropolis about two miles off coming up the river," insert, "bearing in a direction towards
12 the schooner and off the schooner's port bow." Also in the same third allegation of the libel, in the last line of it, insert after, "descried at a distance," the words, "of more than two miles."

In the fourth article of said libel, after the words, "put her helm up," erase the words, "in the wind."

And it is further ordered that said amendment be made by the clerk of the court in red ink in the original libel on file at the time of entering this order.

SAM. R. BETTS.

(Endorsed:) 18—252. In admiralty. U. S. district court. Benjamin F. Town and others vs. the steamship Western Metropolis. Order to amend libel. D & T. McMahon, proctors li'l'ts.
Filed Sept. 29th, 1864.

13 At a stated term of the district court of the United States of America, for the southern district of New York, held at the

United States court-rooms, in the city of New York, on Thursday, the nineteenth day of January, in the year of our Lord one thousand eight hundred and sixty-five:

Present, the Honorable Samuel R. Betts, district judge.

BENJAMIN F. TOWN
vs.
THE STEAMER WESTERN METROPOLIS, &c. } 18—252.

This case having been heard on exceptions taken by the claimants to the libel on file, and having been argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court that the exceptions be and they are hereby overruled, with costs to be taxed against the claimants.

(Signed) SAM'L R. BETTS.

A true copy:

GEO. F. BETTS, *Clerk.*

14 (Indorsed:) Vol. 18. No. 252. United States district court for the southern district of New York. Benjamin F. Town vs. the steamship Western Metropolis, &c. D. & T. McMahon, for libellants. Beebe, Dean & Donohue, proctors for claimants. Certified copy decree overruling exceptions, with costs.

Filed the nineteenth day of January, 1865.

Service of written order admitted.
Jan. 20th, 1865.

BEEBE, DEAN & DONOHUE,
Cl'm'ts' Proct's.

15 To the Honorable Samuel R. Betts, judge of the district court of the United States for the southern district of New York:

The answer of Hiram Benner, Lemuel Brown, and others, claimants of the steamer Western Metropolis, to the libel and complaint of Benjamin F. Town and others, libellants, respectfully shows—

First. That the claimants have duly intervened and claimed the said steamer Western Metropolis; and that the said vessel, her engine, tackle, &c., have been duly delivered to them.

Second. That the claimants allege and insist that the facts stated and set up in the libel do not make out a cause of action cognizable in this district, or on which process could issue herein.

Third. That as to who are the owners of the said Mary E. Town, or whether the libellants, or any of them, are such owners, these claimants and respondents, having no knowledge and no information except from the libel, deny the same; that the respondents and claimants having no knowledge or information in regard to the business, if any, which said schooner was engaged, or where the owners reside, respondents deny the same, as also the other matters stated in the first article or paragraph of the libel.

16 Fourth. That the claimants and respondents, further answering on information and belief, allege that [that] the statements in the second article or paragraph of the libel are untrue; and that if any collision took place, it was the fault of those on the said schooner, Mary E. Town, and not of the steamer Western Metropolis; and that if any

loss or damage happened, it was through the fault, carelessness, and negligence of those on the schooner.

The claimants and respondents, further answering, say that the statement in the article or paragraph third of the libel are untrue, except in such particulars as are hereinafter admitted; and that from information, which the claimants allege to be correct, they allege the truth to be as follows:

That the steamer Metropolis was at the several times stated in the employ of the United States government as a transport, and under the orders and directions of the officers of said government, and that at the several times stated in the libel the said steamer was tight, staunch, and strong, well and sufficiently manned, tackled, apparelled, and furnished with a competent pilot on board, and was bound with
17 for the port of Washington, D. C., from the port of New York, and that at about the time stated, as the said vessel was proceeding up the said Potomac River, near the southerly side of the channel, when said schooner was discovered, and was about anchoring, and had been slowed for that purpose; that the said steamer had all her lights set, and they could be readily seen at a long distance; that the schooner had abundance of room, and could easily, by keeping her course, have avoided a collision; that she had the wind free and nearly aft, but those on the steamer observing that the schooner was not keeping a direct course, blew their whistle as a warning to the schooner to call her attention to the steamer, those on the steamer fearing that no look-out was kept (and in fact none was) on the schooner, and the attention of those on board would thus be called, but the respondents and claimants wholly deny that such signal was by any means notice to the schooner to change her course, or to do any act, but to call attention and let her keep her course; but that notwithstanding that, as the schooner approached the steamer, she was headed across the tract and [and] course of the steamer, and although everything was done
18 on the steamer to [to] avoid the collision, the schooner struck the steamer's stern on passing, and so doing inflicted the injury, whatever it was, that said vessel met with.

Sixth. And respondents and claimants, further answering, say that they wholly deny the statements in the fourth article or paragraph of the libel, and allege and insist that the said collision was [was] wholly caused by the carelessness, mismanagement, and unskillfulness of those aboard the said schooner, and from the incompetency and want of care, skill and knowledge, of her crew, and that those on board the Western Metropolis did all in their power to avoid the collision.

Seventh. The claimants and respondents, further answering, say that they deny the statements in the fifth article or paragraph of the libel, and allege that the steamer, shortly after the collision, anchored, as she was about doing at the time of the collision, and was not asked or hailed for any help or assistance, and did not know that said schooner needed any; that as to each and all of the other matters stated in the said libel in said fifth article or paragraph, claimants having no knowledge, deny the same.

19 Eighth. That all and singular the statements herein are true, and wherein the same differ from the libel, or do not admit the same statements of the said libel, are untrue.

Wherefore the claimants pray that the court would be pleased to pronounce against the libellants' claims, and to dismiss the said libel, with costs, or make such further order or decree as shall be just.

LEMUEL BROWN.

Sworn to before me this 27th day of February, 1865.
[SEAL.] JNO. T. McGOWAN,
Notary Public, New York.

BEEBE, DEAN & DONOHUE, *for Claimants.*

(Endorsed:) U. S. district court. 18—252. The steamer Western Metropolis, her tackle, &c., ads. Benjamin F. Town & als. Copy answer. Beebe, Dean & Donohue, proctors for cl'm'ts.
Filed February 27th, 1865.

20

21 At a stated term of the district court of the United States of America for the southern district of New York, held at the , in the city of New York, on Friday, the twenty-first day of April, in the year of our Lord one thousand eight hundred and sixty-five:
Present, the Honorable Samuel R. Betts, district judge.

BENJAMIN F. TOWN *& als.*
vs.
THE STEAMSHIP "WESTERN METROPOLIS," her tackle, &c. } 18—252.

This case having been heard on a motion on the part of libellants, that the answer of the claimants be stricken from the files of court, as irregularly put in the taxed costs on exceptions, being overruled heretofore, (not having been paid,) and that a decree of default and reference be entered on the above-entitled cause; and said motion being opposed by the claimants, and argued and submitted on briefs and points by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court that the motion be and the same is hereby denied, with costs to be taxed against the libellants.

SAM. R. BETTS.

22 (Endorsed:) Vol. 18, No. 252. United States district court. Benjamin F. Town & als. vs. the steamship Western Metropolis, &c. D. & T. McMahon, for libellants. Beebe, Dean & Donohue, proctors for cl'm'ts. Decree denying motion to strike out answer, with costs.
Filed the twenty-first day of April, 1865.

23 U. S. district court.—Before Hon. Judge Shipman—Thursday, Oct. 25th, 1866.

BENJAMIN F. TOWN *et al.*, libellants,
vs.
THE STEAMSHIP "WESTERN METROPOLIS," respondents.

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24 Mr. McMahon read the libel.
Mr. Donohue read the answer.
Mr. McMahon read the deposition of John Smith, taken Sept. 20th, 1864.
Mr. Beebe read the cross-examination.

Mr. McMahon proposed to read the deposition of John Roberts.

Mr. Donohue desired that libellants' counsel should prove the absence of the witness, Mr. Roberts.

B. F. Town, sworn:

Examined by Mr. McMahon:

Q. You are one of the libellants, are you?

A. Yes, sir.

Q. Were these supœnas put in your hand to supœna Mr. Roberts and other parties for the 16th, the day this cause was set down for trial?

A. Yes, sir; that is correct.

Q. Did you endeavor to find Mr. Roberts, as well as the witnesses named in these supœnas?

A. Yes, sir.

Q. Were you able to find him?

A. No, sir; I could not find him; he aint in the city; he is somewhere down fishing on the fishing banks—mackerel fishing.

25 Q. East?

A. Yes, sir.

Q. Where did you inquire?

A. I wrote a letter to him.

Q. Did you go to his residence in Market street?

A. I didn't go there; I didn't know where that was.

Q. State what you did.

A. I tried to serve the subpœna on him. [Q.] Mr. McMahon handed the subpœnas to me, and I tried to serve them. I wrote a letter to Mr. Roberts and inquired where he lived, and sent a boy up there. I didn't know where he lived; I sent a boy up there, and he could not find him; he said he didn't live there. He gave me his address where to write, and I wrote, and didn't receive any letter from him.

Q. What was the address he gave you?

A. I have the letter down at the loft.

Q. Was it within 100 miles of the city of New York?

A. No, sir; I think it was over that; 200 miles, I guess; down there where they go out mackerel fishing.

Q. (By the court.) Wooster?

A. Somewhere down there; I could not tell where it was.

Cross-examined by Mr. Donohue:

26 Q. Were you present when Mr. Roberts was examined?

A. Yes, sir.

Q. Did you hear him swear, I reside at 137 Market street, in the city of New York?

A. I don't know but I did.

Q. Did you ever go to 137 Market street?

A. No, sir; I sent there, though.

Q. I ask you if you went there?

A. No, sir; you can examine the boy; I can bring him up to-morrow.

The COURT. Mr. Donohue, have you any reason to suppose this man is here?

Mr. DONOHUE. Yes, sir; and I think you will find, when we get a large portion of the depositions in, the reason for my technicaility.

WITNESS. He called on me when he was going away, and told me he was going to leave the city.

The COURT. Mr. Town had better go to Market street himself, and if Mr. Roberts has a family he can inquire of them.

Mr. McMahon proposed to read the deposition of Leon Katzenterg; Mr. Donohue also desired the absence of this witness to be proved.

B. F. Town recalled:

Examined by Mr. McMahon:

Q. What did you do with regard to Mr. Katzenberg?

A. I went over to the steamer that he worked in; the steamer Empire, foot of Wall street. He was not in, and I found the captain that was in her and inquired for the pilot—(objected to)—and found that he
27 was not in the city; he was gone somewhere in Philadelphia; gone into business in Philadelphia.

Q. What was Katzenberg's business?

A. He was pilot; he followed the water.

Q. Where did he reside?

A. His home, when he was home, was in Jersey.

Q. (By the court.) Was he on the schooner?

A. No, sir; he was pilot of the Western Metropolis.

Q. Were you able to find Katzenberg?

A. No, sir.

Q. The information you got was that he was in business in Philadelphia?

A. Gone into the shoe business, I think; yes, sir.

Mr. DONOHUE. Philadelphia is within 100 miles, and the subpœna runs there, and that is the answer to that.

The COURT. I don't know that, Mr. Donohue.

Q. (By Mr. McMahon.) What kind of business was he in?

A. His captain told me he went in the shoe business—went in partnership with some man; I don't know the name of the firm.

The COURT. I don't see how these objections here being waved, can affect it at all; the duty of the witness stands in the same predicament as if he was in the court-room, as far as the legal status is concerned.
28 I don't see as this waiver affects it at all, if the gentleman insists on it.

Q. (By Mr. McMahon.) State between what ports the Empire traded?

[Not answered.]

The COURT. The present witness traced the deponent in the deposition to Philadelphia in the shoe business, which is a fixed business, and he is within a circle of 100 miles, which is conceded on all hands. There may have been a necessity for taking this deposition, but whether there was or not that is all waived; but now the fact appears, on the objections, that the witness is within 100 miles. You must prove that the witness is not within 100 miles. He states that he has made enquiries recently, and ascertained that he is in Philadelphia.

Mr. MCMAHON. It only involves the necessity of asking the court for delay.

The COURT The only question in my mind is, (and it don't affect this case, for it is already in proof, without any objection,) after a deposition has been taken, on the ground that the party is about to depart beyond the jurisdiction of the court, the deposition is put on file, then an objection is taken, and the party making the objection calls for proof that the party is not within the jurisdiction of the court. I am not sure
29 but that the burden can be remedied now in the case of this deposition. A man cannot prove a negative, to prove that he is not within the jurisdiction. I don't know what the practice is here.

Mr. MCMAHON. I think your honor is right upon that.

Mr. DONOHUE. I differ entirely from the gentleman. I think your

honor will find, in the case of the People versus Patten, the question of the absence of a witness discussed; and in the Forrest case the burden is on the party; for this reason, that the deposition is no evidence for any purpose until you prove the absence of the witness, and you cannot read the deposition of the witness to show that the man was about departing.

Judge BEEBE. That was decided by Judge Oakley, than whom a more learned judge never lived in this State.

The COURT. My attention has not been drawn to this question, but this deposition stands on this ground, that the party was going away, as is admitted by the admission of the counsel himself. I have to have delay with the case, and therefore I would be inclined to admit the deposition if I had the power to admit it. I don't see, as the matter now stands, how Mr. McMahon can read that deposition.

Adjourned till to-morrow, October 26th, 1866, at 11 a. m.

30 Mr. McMahon read evidence, the deposition of John Roberts, all objections to reading these depositions withdrawn; cross-examination by Mr. Donohue and re-direct by Mr. McMahon.

Also deposition of Alexander Garvin; cross-examination by Mr. Donohue and re-direct by Mr. McMahon.

Also the deposition of William Geary; cross-examination by Mr. Donohue and re-direct by Mr. McMahon.

Mr. Donohue offered to read in evidence statement of Geary annexed to his deposition.

Libellants' counsel objects; that is a statement made out of court, in which he is not fully examined, and not taken under oath.

Admitted; libellant excepts.

Mr. Donohue puts in evidence subpœna, also annexed to this deposition.

31 Libellant's counsel also reads in evidence deposition of Charles F. Letts; cross and re-cross examinations read by Mr. Donohue, and re-direct by Mr. McMahon.

Also deposition of William Clemenshaw; cross and re-cross examinations by Mr. Donohue and re-direct by Mr. McMahon.

John F. Fox, a witness for libellant, being duly sworn, testified:

Examination by Mr. McMahon:

Q. You were master of this schooner Mary C. Town at the time of the collission, were you not?

A. I was, sir.

Q. Who were the owners of that vessel at that time?

(Proof of ownership waived for the present.)

Q. Where was your vessel bound to?

A. New York.

Q. Where had you come from?

A. From Alexandria that morning.

Q. And you were bound down the river?

A. We were.

32 Q. Were you light or laden?

A. Light, with the exception of ballast—under ballast.

Q. What was your complement of hands on board?

A. Six all told.

Q. Was that your full complement?

A. It was, sir.

Q. Give us in a narrative form the circumstances of the collission, commencing when you first saw the steamer, and what took place up to the time your vessel went down.

A. On the morning of February the 10th, 1864, weighed anchor at Alexandria, 8 a. m.; having discharged her cargo at Geesbury Point, proceeded down the river; at 7 o'clock p. m., we got around Lower Cedar Point; during the day we had the wind from W. N. W., continuing working northerly; we set our light sails about dark, which was then about 7 p. m., I suppose; at half past seven we were all on deck, with the exception of the cook; I was on the quarter, near the wheel; the look-out was on the forecastle deck.

Q. State who he was.

A. We had two.

Q. (Court.) Give us the name of this one you refer to.

A. Charles F. Letts.

Q. State where the forecastle deck was.

33 A. It is far forward, at the bow of the vessel, extending aft about eight feet. I saw the steamer, and kept watch of her; in a few moments——

Q. How far off did you see her?

A. Some five miles.

Q. (Libellants.) State in this connection how she bore to you?

A. She was right ahead; I could see her lights—all three of her lights—both side lights; I was standing by the wheel; next report, forward, "Light ahead;" my answer, "Aye, aye;" next was, I inquired if our light was burning; answer, "Yes." We kept our course direct for the steamer, as was our course when we first saw her; we kept our course; we were, at the time, going about eight knots.

Q. State what direction the wind was at this time.

A. At that time the wind was about N. by W.; clear; could see a vessel of her size four miles.

Q. Of the size of the Metropolis?

A. Yes, sir; I told the man at the wheel to keep her steady, as I saw her course was direct for us; expecting to see her alter her course.

(Respondent objects.)

Q. You kept your course?

A. I knew it was my duty to keep my course, and did so. When within 600 yards I got another report forward that that was a steamer, but I knew that, as at that time sailing vessels carried but one

34 light; I says to the man at the wheel, "Wonder where he calculated on going," as he did not alter his course; then at that time the man at the wheel could see her lights to the windward of our masts and sails, our booms both being on the starboard side; as we neared the steamer I saw there would be trouble; at that moment I heard one whistle; then I was confident what to do, not knowing what the steamer was doing, but thought she must have a large tow, or had just stopped and had dropped his anchor, as I knew he would run but a short distance further in the night with that kind of a vessel. As soon as I heard the whistle I sung out to the man at the wheel, "Hard up," expecting this steamer wanted us to go on her port side, which was the signal of one whistle; I knew it was not my duty to alter my course, and did not until I saw it was the only remedy I could do to save the vessel, and I did as he directed me by blowing one whistle, which, if he had not done, I should hardly have known on which side of him to go or try to go, as there was no chance then for us to have cleared him. A second or two before the collission—I had not before left the quarter-deck—I ran for-

ward and hollered for the steamer to back, which, of course, was of no use. As she struck us I heard them ring three or four bells; I
35 could not tell the number—whether one, two, three, or four; she struck us aft of the main rigging on our port side. At the time of the collission we had the wind about abeam, or thereabouts. We were running about S. E. by E. half E., the river being a little winding; going up that reach, it winds to the northward; as soon as she struck us—we had at this time our sheets about half off; as she blew her whistle we kept off about three points; we did so to avoid the collission.

Q. What was the effect of this collission upon your vessel?

A. She carried away our rail, bulwarks, plank-shear, the broadside about eight feet from the plank-shear down to the water, about two feet below the light-water mark, six feet in our deck, three staunchions, and so forth.

Q. Now, I want to call your attention back to one or two points, since you have stated the substance; where was your light that you had on your vessel?

A. Under the end of the bowsprit, hanging there.

Q. (Court.) What was it?

A. One white light.

Q. Globe lantern?

A. Yes, sir; that is the name we use.

36 Q. (Libellants.) About how wide is the river there at the point of the collission?

A. Five miles about.

Q. Just point out to his honor on that map the place of the collission.

A. It was about three miles above Blackstone Island—three miles or thereabouts, (witness indicates on the map.)

Q. About how far out in the river did the collission take place?

A. We were rather nearest the Maryland shore.

Q. How near to the middle of the river were you?

A. We call the river five miles there; we were about a mile and half from the Maryland shore.

Q. (Court.) When the collission took place?

A. At the time of the collission.

Q. (Libellant.) State how deep the channel is there—whether deep water.

A. At that place in the river there is water from one bank to the other; it gives the bank but a small berth on either side.

Q. (Court.) You mean the water is deep?

A. The deepest water is on the north side, very near the middle.

Q. (Libellant.) At that particular spot, I would ask whether it was fit to anchor in?

A. Why, I suppose it was fit to anchor anywhere that a man
37 would see fit.

Q. With what length of cable?

A. What was the depth of water I could not say, for I never heaved a lead there; the soundings are all on the chart.

Q. (Court.) Are those soundings feet or fathoms?

A. Feet, I judge.

Q. (Libellant.) About how far were you apart at the time she blew her whistle?

A. I had not got through with what I was stating about the collission.

Q. If you want to state anything more, go on.

A. She backed out of us—from the vessel; one of my men got on board, the rest making an attempt—some of them; I told them to get back

and lower our boat so as to stay by the vessel; we did so; threw a few notions on the boat, colors, compasses, and so forth, and some few other notions. The steamer went right on, and some five miles above came to anchor; we distinctly saw her after she had anchored, or saw her light; we drifted down on the ebb-tide.

Q. Your vessel?

A. Our vessel; she sunk though about ten minutes after the steamer struck her, as near as I could come at it.

Q. I want to know how far off the steamer was from you when she blew this whistle?

A. I should suppose about 300 yards.

38 Q. Describe what kind of blast it was.

A. One whistle.

Q. (Court.) How for length?

A. Well, what I should call a long blast.

Q. (Libellant.) Now, I understood you to say that just before the whistle was blown you anticipated trouble?

A. I did.

Q. What did you anticipate trouble about?

A. I was confident the steamer would strike us if we kept our course.

Q. Just state her course at that time—her bearing toward you at the time you anticipated trouble, and before the whistle was blown.

A. About E. S. E.

Q. I mean how did she head toward you?

A. The steamer had been running so the man at the wheel could see her lights to the windward of the mast—say one point or so on our weather bow—our port bow.

Q. Now, at the time you anticipated trouble, and just before the whistle was blown, how did she bear to you then?

A. That is as near as I can come at it.

Q. At the time you anticipated trouble, and just before the whistle was blown, where did you anticipate the steamer would strike you?

39 A. You mean to say if we had both kept our course?

Q. Yes.

A. If we had both kept our course we would have come very near head and head.

Q. Up to the time of the blowing of the whistle, and from the time you saw the steamer, had she made any effort to avoid you in any way, by changing her course, or in any wise?

A. Not that I could perceive.

Q. At or about the time of blowing the whistle, did you observe any change of course on the part of the steamer?

A. I did.

Q. Just state what you observed.

A. About the time our wheel was hard up, I saw her port light begin to shut in; then I was aware the steamer was keeping off.

Q. (Respondent.) Keeping off towards you?

A. Yes, sir; starboarding her wheel, showing her green light, which is her starboard light; but then it was too late to do anything more—we were together.

Q. (Libellant.) She showed her green light?

A. She shut in her port light, showing her green light, which was her starboard light.

Q. That was too late for you to do any thing?

A. That was too late to avoid a collission.

Q. How long have you followed the water?

40 A. I have followed the water about twelve years now.

Q. In what class of vessels?

A. Coasting sail vessels; all kinds; no square-rigged vessels; fore-and-aft-rigged vessels.

Q. You have been master of a vessel now how long?

A. Going on six years.

Q. Suppose the steamer, instead of starboarding her helm at the time she blew her whistle, had ported it; what would have been the result?

A. If she had ported her helm she would have cleared us, or if she had stopped we would have crossed her bows; but she was coming ahead when she struck us; had headway on—had not reversed her engine.

Q. How long have you sailed on the Potomac River?

A. I have been sailing on the waters of the Potomac some seven or eight years off and on a little; during the war have been there most all the time.

Q. Are you familiar with the channel?

A. I am.

Q. Is it necessary for you to have a pilot aboard?

A. It is not; it is not customary among us coasting vessels to carry a pilot aboard; we stand our own pilot.

Q. I want you to state whether or not there has any practice or custom grown up on that river with regard to steamers blowing whistles,

41 and what that practice is.

(Objected to; taken subject to objection.)

A. A steamer don't usually blow whistles for sail vessels, without being placed in a critical situation—then to avoid a collission; I have been on board of steamers and seen one whistle blown for the opposite vessel to keep to her right, but I don't think it is the law; it is nothing more than custom; it is done to avoid a collission.

Q. And when that whistle was blown to you, what did you understand it to be?

(Objected to.)

A. I was confident that he wanted us to go to our right—keep to the right; the instant I heard the whistle blown my mind was fixed, and he went contrary to the whistle of the steamer.

Cross-examined by Mr. Donohue:

Q. I understand you to say you were master of this vessel?

A. Yes, sir.

Q. When you first made the steamer's lights, you made the three?

A. I did.

Q. Red, green, and white, or bright, as they call it?

A. Yes, sir.

Q. And those were, as near as you can say, pretty directly ahead?

A. Yes, sir.

42 Q. And so far as your recollection of it is concerned, from that time up to the time the whistle was blown, no change was made in either vessel?

A. Not that I could perceive.

Q. Your best recollection is now, that no change was made?

A. I know we made no change, and did not perceive any from the steamer.

Q. And when the whistle was blown at that time, if something had not been done by one or the other, you have no question but a collission would have taken place?

A. I have not.

Q. You have no doubt about that?
A. That is my opinion.
Q. And in following the signal by porting, you did it simply to avoid a collission, which was then in your judgement imminent?
A. Yes, sir.
Q. Would you have done it under any other circumstances?
A. No, sir.
Q. You did not consider there was any such rule or regulation as required you to do it; did you consider there was any law, rule, or regulation that required you to get out of a steamer's way, or to port for her?
A. I did not consider there was any law for us to alter our
43 course till I heard the whistle; then I knew it was the custom for us to go according to the whistle.
Q. Then your present judgement is that it was customary to follow a steamer's whistle to go to the right?
A. Yes, sir; for I had seen it done before.
Q. Where?
A. On the Potomac, round Alexandria.
Q. By what steamer?
A. By tug-boats; I have never been on board of a steamer, except——
Q. Did you see it anywhere but in that one instance?
A. I can't say that I have; but I have often heard it; I have often heard captains say so, and have seen captains do it I have been with.
Q. You considered it was her duty to get out of your way; not yours to get out of hers?
A. Yes, sir.
Q. You knew that?
A. I knew that.
Q. What is your full name?
A. John Tilton Fox.
Q. Do you write your name?
A. I can, sir.
Q. There, it appears, you signed it with your mark. (Showing libel to witness.)
A. No, sir.
Q. Never signed that by your mark?
A. No, sir; that is Captain Kramer's mark.
44 Q. That signature there is yours—John T. Fox?
A. Yes, sir.
Q. The signature to the libel is yours—you did sign it, and you did swear to it?
A. I don't know what paper that is.
(Admitted by libellants' counsel that the witness signed the libel.)
Q. You went to see the counsel, of course, before this suit was commenced?
A. I did.
Q. And detailed a statement of the case to him?
A. We did.
Q. You say you set your light sails that night; when did you commence setting them?
A. After we had got round Lower City Point.
Q. What time?
A. About seven o'clock.
Q. What sails did you set?
A. We set our fore and main gaff-top-sails.
Q. Anything else?

40 A. I have followed the water about twelve years now.

Q. In what class of vessels?

A. Coasting sail vessels; all kinds; no square-rigged vessels; fore-and-aft-rigged vessels.

Q. You have been master of a vessel now how long?

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Q. How long have you sailed on the Potomac River?

A. I have been sailing on the waters of the Potomac some seven or eight years off and on a little; during the war have been there most all the time.

Q. Are you familiar with the channel?

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Q. When you first made the steamer's lights, you made the three?

A. I did.

Q. Red, green, and white, or bright, as they call it?

A. Yes, sir.

Q. And those were, as near as you can say, pretty directly ahead?

A. Yes, sir.

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Q. And when the whistle was blown at that time, if something had not been done by one or the other, you have no question but a collission would have taken place?

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A. After we had got round Lower City Point.
Q. What time?
A. About seven o'clock.
Q. What sails did you set?
A. We set our fore and main gaff-top-sails.
Q. Anything else?

A. No, sir; that made six sails; that was all we set.
Q. You had four sails set already?
A. Yes, sir.
Q. That is, the fore and mainsail, and two jibs?
A. Yes, sir.
Q. Who set those sails?
A. I gave the order.
45 Q. You did not yourself personally?
A. Yes, sir.
Q. Who did?
A. I suppose the mate saw to it; I gave him the order to set those sails.
Q. You suppose he saw to it—you were there; didn't you see them set?
A. Yes, sir.
Q. Who set them?
A. All hands; he gave the order to the rest of the boys, and they obeyed the order.
Q. Had you had your supper that night before the collission?
A. We had.
Q. What time did you get it?
A. Before dark.
Q. Had you not been in the cabin just before the light was reported?
A. I had not been in the cabin after dark.
Q. How long will you here swear it was from the time you had been in the cabin till the light was reported?
A. I could not say that I had been in the cabin within three hours.
Q. Can you swear you were not in the cabin within three hours?
A. I can swear I was not in the cabin within two hours.
Q. I ask you, will you swear that you were not in the cabin within two hours of the time you saw the light at some time, whether
46 for a minute or more?
A. I might have been in the afternoon.
Q. Will you swear you had not been in the cabin within two hours of the time of the collission?
A. I will.
Q. You had not been?
A. No, sir.
Q. What hour did you get your supper?
A. We had supper, I suppose, about half past four or five o'clock.
Q. Where did you get it—on deck or in the cabin?
A. In the cabin, of course.
Q. Were you in the cabin after you got your supper?
A. No, sir; I don't think I was.
Q. You will swear distinctly that for two hours before the light was reported at no time were you in the cabin?
A. Yes, sir; we were coming round Lower Cedar Point, and that is a part of the river it requires a pilot to run, and for that reason I was on deck; it is a very difficult part of the river to run.
Q. Why?
Because at that time there was no light-boat there, and it is a very narrow place, very bold on both sides; from one fathom you will have twenty or less—ten—rinse.
47 Q. How long was that before the collission?
A. That was about from half to three quarters of an hour; it was just after dark when we came round Lower Cedar Point.
Q. You did not go below after you got round it?

A. No, sir; then I ordered the light-sails set; and I was walking the quarter. It was a pleasant moderate night, and I was thinking what a pleasant run we were going to have to New York.

Q. After the lights were set, you did not go in the cabin?

A. No, sir.

Q. You say Letts was on the forecastle on the look-out?

A. There is where I ordered him.

Q. Did you see him there?

A. I did.

Q. All the time?

A. No, sir.

Q. How long was he there?

A. He was there when he came to report to me the steamer; he jumped off, came aft, and said to me there was a light ahead.

Q. What did he say?

A. He said there was a light ahead.

Q. Nothing more?

A. Then he went forward; says I, "All right;" I gave him the answer that I understood him, because I had seen the light myself; he went forward; I could not say whether he got up on the forecastle deck or
48 not; then he came aft again and said it was a steamer.

Q. When she got close to you again?

A. As she neared us he came aft again with the report that it was a steamer.

Q. Did any one else report her?

A. No, sir; the man at the wheel spoke to me once, and said, "There is a steamer right ahead of us;" I spoke to him and said, "Keep her steady," which I always do when I see a steamer, and steer as straight as we can; I saw her light was burning; I inquired about that.

Q. Did any one else report or remark as to the steamer?

A. They might among themselves.

Q. To you?

A. Not to me.

Q. The very moment her whistle was blown, did you immediately put your helm up?

A. Yes, sir.

Q. Was it the subject of any conversation about putting it up?

A. After I put the wheel hard up, I ran forward and said, "Charlie, one whistle is to keep to the right, ain't it?" as I knew he had been in steamers before; I knew I was right, but still I thought I would ask him, and in a moment I said, "Charlie, one whistle is to go to the right?" and he said, "Yes, hard up."

Q. You had put your helm hard up before?

A. I had, before I said a word to him.

49 Q. Where did you find Charles Letts?

A. He was standing right by the fore-traveler—that is right off the forecastle deck.

Q. This was after he had reported her the second time?

A. He had.

Q. Was there any other conversation about putting up the wheel or that one blast of the whistle, except what you have stated?

A. Not with me.

Q. By anybody?

A. By anybody.

Q. What was Letts' position?

A. He was mate.

Q. Can you tell about how long you were engaged in setting your two gaff-top-sails?

A. I suppose fifteen minutes; the sails were dry.

Q. Both sails set in fifteen minutes?

A. Fifteen or twenty.

Q. May be a little more?

A. It might vary.

Q. When the whistle was blown, I understood you distinctly to state that the vessels were heading about directly opposite courses?

A. Yes, sir; very near; I stepped to the wheel and I could see the steamer's lights were both open to the westward of our masts and sails.

Q. You could see both of her lights?

A. Both of the lights.

Q. And you can't have any doubt in your judgement now about
50 the fact that they were going in as near as could be seen exactly opposite courses?

A. Yes, sir.

Q. So far as you saw aft there, you saw the lights to the windward of the masts?

A. Yes, sir.

Q. To the windward and between the masts and the rigging—the shrouds?

A. Yes, sir.

Re-direct examination by Mr. McMahon:

Q. I wish you would show to the court by those models how the vessels came together.

A. Something like that I suppose, (illustrating by models;) that was the course I saw them some five miles distant; we were going about seven knots.

Q. You ported your helm?

A. As we came together, both running; as he blew one whistle, I had an idea that he had made up his mind—he blew the whistle, and I sung out, "Hard up;" he starboarded his helm, contrary to the whistle.

Q. Explain about the shutting in of those lights—the green light and the red light.

A. She has two lights; the starboard light is a green light; the port light is a red light; we at that time carried but one light; that
51 was under the jib-boom; that was all; we could see both her lights by coming head and head; and as she came near us she shut in in this way, (illustrating;) her light is screened by a box in that way, so as not to be seen.

Q. Was the shutting-in of her red light before or after the whistle?

A. Not until after.

Q. How large a vessel was this Metropolis?

(Admitted by counsel for respondents that the Western Metropolis was 2,100 tons burthen.)

Q. What was your tonnage?

A. Our tonnage by the new measurement is 142.

Re-cross-examination by Mr. Donohue:

Q. According to your best judgement, if your courses were continued as they were before the whistle was blown she would have hit you about head and head somewhere on your port bow?

A. My best judgement is that if we had both kept our course she would have struck us about here; something like that.

Q. You would have either struck her near her wheel or she would have struck your port bow?

A. Yes, sir.

52 Joseph Lewis, a witness on behalf of libellants, being duly sworn, testified as follows:

Examined by Mr. McMahon:

Q. What is your avocation?

A. I am a sea-faring man.

Q. How long have you followed the sea?

A. About twenty years; somewhere near that.

Q. In what class of vessels?

A. Coasting vessels and steamers.

Q. Have you sailed on the Potomac?

A. Yes, sir.

Q. In what class of vessels?

A. In schooners and in steamers.

Q. Have you sailed on the Potomac in schooners and steamers? During what time?

A. Well, during the war I was on steamers altogether.

Q. (By the court.) How many years on both on that river?

A. Well, I have not been stationed on the Potomac for any length of time, although I have been during the war some two or three months at a time on steamers.

Q. Do I understand you to mean that during the four years of the war you were in the habit of going up and down the Potomac very often?

A. Part of the time.

Q. Both in steamers and in schooners?

A. Not in schooners during the war.

Q. In steamers?

53 A. In steamers.

Q. What was your capacity on the steamers?

A. Captain most of the time.

Q. Are you acquainted with the signals that are used between steamers?

(Objected to.)

A. Yes, sir.

Q. I want you to tell the court what the signal of one whistle means, and what the signal of two whistles means.

(Same objection.)

A. In meeting steamers, one whistle is to go on the starboard hand of the steamer that you are meeting; if I blow one whistle I go on the starboard hand of the steamer that I am meeting; that is one whistle. Two whistles is to go on the port hand.

Q. In other words, one whistle you keep to your right, and two whistles you keep to your left?

(Same objection.)

A. Yes, sir.

Q. Prior to February, 1864, have you known of any practice on that river of steamers blowing whistles when meeting vessels?

(Same objection.)

A. Not to my knowledge; it is not the custom.

Q. Have you known of any practice?

(Same objection.)

A. No, sir.

Q. What have you known about it?

54 (Same objection.)

A. I have done it myself on the Potomac, where the river was narrow and a good many vessels.

Q. You have done it for what purpose?

(Same objection.)

A. I have done it for them to give me room to pass them.

Q. That is, you have blown it to sailing vessels?

(Same objection.)

A. Blown it to sailing vessels.

By the court:

Q. What signals did you give, and for what purpose?

A. I gave a signal to let them know I was coming, and to get by them.

Q. When you blew your whistle how did you blow it, and what was the purport of it?

(Objected to.)

A. If I wish to go on, to leave them on my port hand, I give them one whistle; but it is not customary.

By Mr. McMahon:

Q. On the other hand, you blow two whistles?

(Objected to.)

A. Yes, sir.

Q. Have you any practice to be followed by any other vessel but yourself?

(Objected to.)

A. I cannot say that I have.

Cross-examined by Mr. Donohue:

Q. The whistle that you give to port or starboard is a short blast, or two blasts?

A. Yes, sir.

55 Q. And that is the regulations, is it not?

A. Yes, sir.

Q. Don't the rules say one short blast, or two short blasts, which means right or left?

A. Probably three seconds.

Q. A short blast?

A. Yes, sir; meeting a steamer.

Q. When you are coming to a dock, or calling attention to your approach, don't you do it by a long whistle, if you want to call attention?

A. I don't know that I recollect the rules; I don't know that there is any rule on that subject before that.

Q. If you wanted to call attention to yourself in any way would you not give a long-continued whistle?

A. I have done it; and I have given four or five short blasts.

Q. But it is very frequently the fact you would not adopt a short blast, or two short blasts, merely to call attention to you?

A. Yes, sir.

Q. A short blast to call attention?

A. Sometimes half a dozen?

Q. You would not give a single short blast to call attention when you were approaching a vessel?

A. No, sir.

Q. On a dock, your way would be to give a long blast; or else, successively, 4 or 5 or 6 short blasts?

A. In coming to a dock; yes, sir.

Q. If you wanted to call attention to yourself would you not
56 give a long blast, or four short blasts?

A. I should give a long blast.

Q. In these cases that you speak of, you say you were going along a narrow channel, or a narrow way?

A. Yes, sir.

Q. Would you have done the same thing in a wide place where you had plenty of room?

A. No, sir.

Q. You would not expect a sailing vessel to get out of the way or obey such signals; would you expect any man to consider that a signal, in a wide open space, for a sailing vessel to do anything?

A. I don't know that there is any custom of the kind?

Q. Have you ever known it done?

A. I have known it done; I have known them to blow whistles.

Q. In a wide place?

A. Yes, sir.

Q. Plenty of room?

A. Yes, sir.

Q. When?

A. I have heard of its being done; I don't know that it has been done myself. I never have done it.

Re-direct examination by Mr. McMahon:

Q. You say you have heard of one long blast being given in a
57 wide space; for what purpose?

(Objected to.)

A. To attract the attention of a vessel.

Q. To go to the right or left; anything of that kind?

(Objected to.)

A. No, sir.

Q. Where there is a plenty of sea-room in a river of that kind; nothing in the way; clear starlight night; vessels in sight of each other for miles; do you consider it a proper signal for a steamship to blow one long blast to a sailing vessel?

(Objected to.)

No, sir.

Re-cross-examination:

Q. Don't you find a great deal of difficulty in sailing vessels approaching steamers that way, fearing they don't see you, and yawing about your course?

A. There are some cases of that kind.

Q. You frequently find them that way approaching, yawing, being uncertain as to what you are going to do, and undertaking to do something else?

A. It is hard to tell sometimes.

By the court:

Q. When you are in charge of a steamer, and meeting a sailing vessel on the river, and you are coming within 300 or 400 yards head on, or nearly head and head, the one or the other whistle has got to be made?

58 A. Yes, sir.

What do you do in such a case as that; do you give any notice to a sailing vessel?

It is not common.

You simply take the responsibility on your shoulders of clearing her?

Yes, sir; if I am on the steamer.

(By Mr. McMahon.) Would you consider it good judgement to blow a long blast, which would have a tendency to confuse a sailing vessel?

(Not answered)

Nathan S. Cramer, a witness on behalf of libellant, being duly sworn, testified as follows:

Examined by Mr. McMahon:

Q. What is your occupation?

A. I follow coasting vessels for a living.

Q. How long have you followed that business?

A. About twenty-six years.

Q. Been captain of vessels?

A. Yes, sir.

Q. Have you sailed on the Potomac?

A. Yes, sir.

Q. How long?

A. Well, I have sailed up and down there for the last 18 to 20 years.

Q. During that time have you known any custom or practice that has grown up on that river with regard to steamers giving signals to sailing vessels?

59 (Objected to.)

A. Yes, sir; there is a practice that we generally go by.

Q. What is the practice that has grown up, and when?

(Objected to.)

A. Well, the practice in steamers and sailing vessels is pretty much the same as those two steamers; a fore-and-aft vessel and a steamer coming head and head, both vessels keeping their course, we always calculate for the steamer to get out of her way; but if she blows one or two whistles, one whistle is to go to the right, and two to the left.

Q. You always calculated the steamer would get out of the way, but if she blows these whistles you do what?

(Objected to.)

A. We make an attempt then to answer her whistles.

Q. Can you tell the court how long that practice has grown up there?

(Objected to.)

A. Well, I don't know that I can exactly; it has been more practised during the war than it ever was before.

Q. Can you tell you why?

(Objected to.)

A. There has been a great many vessels—a great many steamers—during the war that the government had chartered, going up and down this river; to avoid collission.

Q. Is that understood among sailing vessels?

(Objected to.)

60 A. Yes, sir; there is not one out of 50 that don't understand it.

Q. Suppose there were no whistle blown there, and a schooner was coming down the river, and a steamer going up the river, and they got 300 yards apart, almost head and head, the steamer not changing her course any, and the canvass keeping her course, would you consider

it good judgement for the schooner, under such circumstances, to make an effort to avoid the impending collission?

(Objected to.)

A. I should not make any effort unless it was getting pretty close quarters, and that is very close quarters, and when a man sees there is no other redemption for him, he is bound to make an effort of some kind to avoid it, the same as he would to save his life.

Q. Do you consider 300 yards very close quarters?

A. I consider 300 yards very close quarters for a steamer of that dimensions.

Cross-examined by Mr. Donohue:

Q. What vessel are you in?

A. J. W. Rumsey.

Q. What relation are you to Freeman N. Cramner?

A. None at all.

Q. How long have you been in the Rumsey?

A. I have been into her about 2 years.

Q. Before that what were you in?

A. I was in the schooner Mary C. Town just before that.

61 Q. How long were you in her?

A. I went into her about 18 months, I think, before I sold out.

Q. What vessel before that?

A. I was in schooner Ino.

Q. Were you in the schooner Emeline C. Johnson at one time?

A. No, sir.

Q. What vessels have you gone in prior to February, 1864? What vessels have you gone on the Potomac River in?

A. I was in a steamer just before that.

Q. What steamer?

A. I was in the steamship Bienville.

Q. In the government employ?

A. Yes, sir.

Q. When were you in her?

A. That was in 1862, I think; yes, sir, it was 1862.

Q. In 1861 and 1862?

A. Yes, sir; I disremember exactly.

Q. Did you follow the practice then of whistling schooners out of your way?

A. I have done such things.

Q. Where you had plenty of room on either side to go on either side of her?

A. No, sir.

Q. In close quarters?

A. Yes, sir.

Q. If you saw a schooner a mile or half mile off, going in opposite directions there is no necessity of whistling her out of the way at all?

62 No, sir; not if she is going in a different direction from what I am going.

Q. And plenty of room?

A. Yes, sir.

Q. And you don't know that you have ever practised it while you were in the Bienville.

A. I have done it.

Q. When you had plenty of room and plenty of time?

A. I never had anything of that kind to happen me where I had plenty of room; but I have seen it where I had not head-room so much, and where there were other vessels.

Q. That is, where there were several vessels around, or something to hamper you?

A. Yes, sir.

Q. Have you ever, in a schooner, and, if so, what schooner, got out of the way, or been whistled to to get out of the way by a steamer when she had plenty of room, and nothing to obligate you to do it?

A. Yes, sir; I done it in the schooner Ino. I have had it done to me right outside of the beach, and there is most always plenty of room there for all hands.

Q. You find steamers pretty generally do it?

A. No, sir; I don't know that they do. I never seen all the steamers.

Q. Do they do it any more there than anywhere else?

63 A. Not that I know of.

Q. They practice the same course there that they do elsewhere?

A. I suppose so.

Q. That is as far as your knowledge and experience goes?

A. Yes, sir.

Q. You know of no different way of doing it?

A. No, sir.

Q. When were you in the Ino?

A. I think it was in September that I got out of her.

Re-direct by Mr. McMahon:

Q. During the war were there many steamers and sailing vessels navigating the Potomac?

(Objected to; objection sustained.)

Q. If such a signal was given by a steamer when she had plenty of room to a sailing vessel, would you consider it proper or improper?

A. I should consider it was his place to answer the signal as nigh as he could.

Q. You would have considered it the schooner's place to have answered his signal?

A. Yes, sir.

Q. Would you consider it a proper course for the steamer's pilot, under such circumstances, to blow such a signal?

A. No, sir; I don't see why he had any right to blow it in a place of that kind.

Q. If he did blow such a signal, under those circumstances, what would the sailing vessel be authorized to infer?

64 (Objected to.)

Q. I understood you to say when the steamer blows one whistle the sailing vessel is expected to port and go to the right?

A. Yes, sir.

Q. And I understand you to say that is the universal rule as far as you know?

A. Yes, sir.

Q. Even though the steamer may blow her whistle, giving that notice, when it is unnecessary, if you were on a schooner you would port your helm?

A. Yes, sir; coming anywhere in a close contact.

Q. If no whistle is blown you understand the sailing vessel is to keep her course?

A. I should keep right straight on. In case of a time of that kind,

when you come too close, and a man sees he has no other chance of his life, he will do something to save it.

Re-cross-examination:

Q. You speak of obeying the signal; when you put yourself in a place where the steamer's track is, as you suppose, to go to the right, you think the man would be right in obeying the signal to go to the left?

A. If he blowes the signal for him.

Q. One way or the other for him; you think it would be right to follow it?

A. Yes, sir.

Re-direct:

65 Q. Would you understand there was some reason for the blowing of that whistle?

A. Yes, sir; if there was no reason they would not blow it.

Q. Even if you saw nothing in the way you would think there was some reason why they would blow the whistle?

A. Yes, sir.

(Objected to.)

The COURT. It is argument and not evidence.

George W. Clifford, a witness on behalf of libellants, being duly sworn, testified as follows:

Examined by Mr. McMahon:

Q. How long have you followed the water?

A. About seven years.

By the court:

Q. What is your age?

A. My age is twenty.

Q. In what capacity have you been on the water?

A. I have been sailorman—before the mast.

Q. What else?

A. I have been cook, and I have been mate of a vessel.

Q. And you were wheelman on this schooner?

A. Yes, sir.

By Mr. McMahon:

Q. Suppose you give us, in a narrative form, what you recollect
66 of the circumstances of this collission—when you first saw the steamer come to Cedar Point?

A. When we first came round Cedar Point it was about seven o'clock. When we were within about four or five miles of the Blackstone Island, we saw the steamer's light ahead. I kept the schooner right for the steamer—right for the light ahead. The captain told me to keep her steady, and I told him, "All right." When she was within about 300 yards she blew a long whistle. Then the captain told me to keep her off—to roll my wheel hard aport, and I did so. Then the schooner kept off very fast, and very quick. The steamer, after she blowed her whistle, she kept off, too, some.

Q. When you say, "kept off, too," what do you mean?

A. She starboarded her helm and struck us aft our main rigging, cut a hole in her about two feet below the light-water mark, and the schooner sunk within about ten minuites.

Q. Did you keep at your helm?
A. Yes, sir.
Q. All the time?
A. All the time.
Q. What next occurred?
A. That was about ten minuites before 8 o'clock.
Q. This occurred about ten minuites before 8 o'clock?
A. Ten or twenty minuites before 8 o'clock; I don't exactly know which.

Q. Then what occurred when your vessel sunk—what did you do?
67 A. We lowered our boat and went into it. The steamer backed out, and went up the river.

Q. I want to know whether you altered the course of the schooner at any time from the time you first saw the steamer up to the time of blowing that whistle?
A. No, sir.
Q. Did the steamer alter her course prior to the blowing of that whistle?
A. No, sir.
Q. Suppose you had both kept your courses, and there was no whistle blown, how near would you have come to each other?
A. We would have come into one another head and head.
Q. Have you been navigating on the Potomac River?
A. Yes, sir.
Q. About how many years?
A. About three, four, or five years—something like that.
Q. In schooners?
A. Yes, sir.
Q. Do you know of this practice that has been spoken of by one of the witnesses in regard to steamers blowing whistles?
A. When a vessel is placed in a condition that she has to get out of the way, the steamer will blow one whistle to go to her left.
Q. That is in a tight spot?
A. Yes, sir; in a tight place.
68 Q. Is that understood among those who sail on that river?
The COURT. You can ask him what the practice is, as far as he knows of, if he knows what it is.
Q. What is the custom?
A. When a vessel is coming head and head, when it gets so near they will blow a whistle; and then we will keep off one way or the other. If they blow two whistles, we will keep the other way.
Q. Do you know of anything that the schooner could have done to have avoided the collission?
A. Nothing more than she did do.
Q. Suppose you tell the court what you think the steamer could have done to have avoided the collission?
A. The steamer could have ported her helm, and she would have cleared us.
Q. When could she have done that?
A. Before she blew the whistle, or at the time she blew it.
Q. What else could she have done, if anything?
A. She could have slowed and backed.
Q. Was she under way at the time? Had she stopped her wheels?
A. She was coming ahead.
Q. At the time she ran into you?
A. Yes, sir.

Q. What, if anything, did you observe on that point? You said
69 she was coming ahead. Did you observe anything?
A. Observe anything in what way?
Q. On the part of the steamer; did you see her wheels moving?
A. I saw her wheels move just before she struck us.
Q. Ahead or backward?
A. Ahead.
Q. How fast do you think she was going?
A. I suppose she was going about four or five miles an hour when she struck us; she might have been going faster.
Q. Who had you on your vessel forward on the look-out?
(Objected to.)
Q. Had you any one forward on the look-out, and who?
A. Charles Letts.
Q. How long had he been forward on the look-out before the collision?
A. I cannot say how long he was there; he was there sometime; he was there when he first saw the light.
Q. How do you know that?
A. I saw him there.
Q. As you sat at the wheel, how did the steamer bear to your vessel when you first saw her?
A. She bore between our rigging and mast, to the windward of our mast.
Q. How far was she off when you first saw her?
A. She was about three or four miles.
Q. Up to the time the whistle was blown, how did she bear towards you?
A. She bore the same way right between the mast and rigging.
Q. How does your vessel steer?
A. She steers very good, light.
Q. You were light on that night?
70 A. Yes, sir.

Cross-examined by Mr. Donohue:

Q. Whose look-out was it from six to eight o'clock?
A. There was no watch set particularly.
Q. No look-out?
A. There was a look-out; we were.
Q. Whose look-out was it?
A. Charles Letts.
Q. From six till eight.
A. Yes, sir.
Q. Was he on the look-out from 6 till 8?
A. Yes, sir.
Q. At this place you state?
A. Yes, sir.
Q. During the same time?
A. Yes, sir.
Q. All the time?
A. He was.
Q. Where was he?
A. He was walking forward and aft between the rigging and mast.
Q. From six to eight?
A. Yes, sir; down on the deck.
Q. Where was the mate from six to eight?
A. He was on the forecastle deck.

71 Q. Where was the cook?

A. The cook was in the cabin, I believe; I won't be certain where he was.

Q. When you saw the steamer first, did you see the steamer or her light?

A. I saw her light first.

Q. Was that 3 or 4 miles that you speak of?

A. Yes, sir.

Q. At that time, as I understand you, the two vessels were as near head and head as could be?

A. They were.

Q. And if neither vessel had changed her course, according to your present recollection of it, they would have come together head and head from the time you first saw them?

A. Yes, sir.

Q. The steamer could have cleared you by either porting or starboarding, if she had not whistled at all?

A. If she had not whistled and starboarded her helm, she would have struck us.

Q. Where?

A. If she done the same as she did without blowing her whistle.

Q. Where would she have struck you?

A. She would have struck us in the same place.

Q. And you had not done anything then?

A. If we had not done anything, she would have struck us forward.

Q. You know when she whistled?

72 A. Yes, sir.

Q. Suppose she had not whistled, and at the same time she had whistled she had starboarded and had whistled, and you had kept your course, where would she have struck you?

A. She would have hit us forward.

Q. What part of you forward?

A. She would have struck us on the weather bow.

Q. How much did she swing by starboarding before hitting you?

A. I could not say how much; may be a point, or a half point; I cannot say exactly.

Q. You were looking at her approaching?

A. Yes, sir.

Q. And that is the only change, to your recollection, that was made by her?

A. That is all.

Q. And that was from half a point to a point in starboarding?

A. Yes, sir.

Q. How did the two vessels come together, as to the blow—a pretty square blow?

A. Yes, sir.

Q. She hit you about square on?

A. Not exactly square; a little slanting.

Q. A point slanting?

A. I don't know exactly.

Q. Do you think it was as much as a point?

73 A. I could not say; it may be about half a point slanting.

Q. And that stand was aft?

A. Aft a little.

Q. You recollect looking at her all the time, from the time you first saw her until the time of the whistle and the collission, and all the recol-

lection you have of any change she made, as far as you know, was from half a point to a point starboard?

A. After she blew the whistle.

Q. From the time you first saw her, up till the collission, that was the only thing she did?

A. The only thing I saw.

Q. About how long after the time you first saw her lights till the collission, at the best of your recollection?

A. I don't know exactly; it might be half an hour, and it might be more.

Q. You were running 8 knots?

A. Seven or eight; something like that; it was with the tide.

Q. That is, including the additional velocity the tide gave you?

A. Yes, sir.

Q. And, to the best of your recollection, it was about half an hour before you saw her?

A. Yes, sir.

Q. How far above Blackstone light were you when you first saw her?

A. We were about 4 or 5 miles.

74 Q. When did the collission take place, as far as Blackstone Island light was concerned?

A. I cannot say exactly how near; a little above it, I believe.

Q. By a "little," what do you mean?

A. I suppose may be we might be a mile or half a mile above.

Q. To the northward and westward of her?

A. Yes, sir.

Q. Your recollection is now distinct, that from the time you first saw the vessel, up to the time the whistle was given, if neither vessel had done anything, there must have been a collission?

A. Yes, sir.

Q. And the vessels came near head & head?

A. Yes, sir.

Q. And their course was direct head and head towards each other?

A. Very near; yes, sir.

Q. Tell exactly, as near as you can form a judgement.

A. She was a little on our weather bow.

Q. She was a little on your weather bow, but the courses were head and head?

A. Yes, sir.

Q. The two vessels' courses were directly opposite to each other?

A. Yes, sir.

Q. From the time you first saw her, till the time the whistle was

75 heard, she continued to bear exactly between your mast and rigging to you?

A. Yes, sir.

Q. What did you first hear that night?

A. I heard them sing out, "Light, ho!"

Q. Who did you hear sing out?

A. I heard the mate, Letts, on the forecastle deck.

Q. He sung out that from the forecastle deck?

A. Yes, sir; I don't know whether it was from the forecastle, or whether he came aft; I heard him sing out, "Light, ho!"

Q. Did you see him when he sung it out?

A. No; I heard him, though.

Q. How long had he been out of your view when he sung out?

A. I don't know exactly how long; I could not say.

Q. Do you recollect seeing him afterwards?
A. Yes, sir.
Q. Where did you see him afterwards?
A. I seen him forwards.
Q. On the forecastle?
A. No, sir; standing aft of the forecastle deck, right up behind it.
Q. After he sung out?
A. Yes, sir.
Q. What was the next reference you heard to that?
A. I heard him say it was a steamer.
Q. When was that?
A. That was after he was forward.
76 Q. Some little time?
A. Yes, sir.
Q. Had anything been said of its being a steamer before that?
A. Not that I heard of.
Q. How far do you think it was off when he said it was a steamer?
A. I cannot say; she might have been two miles off, and she might have been a mile off.
Q. When you first saw these lights 4 or 5 miles off, didn't you know it was a steamer?
A. I knew it; I took it to be one.
Q. Did Letts know it was a steamer?
A. I suppose he did.
Q. But he didn't announce it was a steamer till she got some considerable distance nearer?
A. Not till he saw her.
Q. When he said it was a steamer, could you see the hull of the vessel?
A. Yes, sir.
Q. Did you suppose, at that time, that she was coming full speed?
A. I supposed she was.
Q. From all this you supposed she was coming full speed?
A. Yes, sir.
Q. Did you see any change in her speed or her action until she struck you?
A. No, sir; I did not.
77 Q. You heard the first report and the second report of the mate that you speak of?
A. Yes, sir.
Q. When the mate reported the second time, she was about a couple of miles off? What next was said on your vessel?
A. The captain told you to keep your vessel steady. Did he state it a second time?
A. No, sir; he did not.
Q. You were keeping these lights right in view all the time?
A. Yes, sir.
Q. In your judgement, you cannot be mistaken about the course or navigation of the steamer?
A. No, sir; I cannot.
Q. Was it distinct under your eye all the time?
A. Yes, sir; right under my eye.
Q. After the second report, what was the first thing that was said on board of your vessel about this approaching vessel?
A. The captain asked me, "I wonder which side he calculates on going?"

Q. When was that?
A. That was after he reported it was a steamer.
Q. At that time could he have gone either side?
A. Yes, sir; he was far enough off to go either side.
Q. A point either way would have cleared you?
A. I don't know that a point to leeward would have cleared us.
Q. How far off to leeward would have cleared you?
78 A. A point and a half or two points, or a point might have cleared us that far off; I cannot say exactly.
Q. Had the steamer time, from the time she blew the whistle, to get off more than half a point to a point before the collission?
A. No, sir; not the way we were going?
Q. That you are certain about?
A. Yes, sir.
Q. How long before the whistle was it that your captain suggested his doubt which side of him the steamer was going?
A. Some little time; I cannot exactly say how long, but it was some little time.
Q. Was there anything said then before the whistle?
A. No, sir; not as I know of.
Up to the time the whistle was sounded did you make up your mind which side she was going, or did you still doubt which side she was going?
A. No, sir, I did not; we thought she would go the windward of us, if anything.
Q. How long did that continue to be your opinion?
A. Until she blowed the whistle.
Q. Then what did you think?
A. I knew then she wanted us to go to the leeward.
Q. And you still continued to think she would go the windward of you?
A. Yes, sir.
Q. Then what took place? When she blew the whistle you put your wheel right up?
79 A. Hard up.
Q. Did you lose sight of either of the lights?
A. I lost sight of her port light.
Q. When?
A. When she kept off.
Q. Not before the whistle blew?
A. Not before the whistle blew.
Q. But after you kept off?
A. Yes, sir.
Q. How much did you fall off?
A. I suppose we fell off about 3 or 4 points; I could not exactly say.
Q. Not more than that?
A. She might have fell off more, and not so much.
Q. (Referring to diagram marked Ea.) That is about the way the came together?
A. Yes, sir.
Q. That is the hole where she went in?
A. Yes, sir.
Q. If the steamer went off but from half to one point, would it not be necessary for you—would it not be the fact that your vessel must have fallen off more than 3 to 4 points to get into that position?
A. No, sir; not the way she was off from me when we first kept her off; she had some little time to go ahead keeping off.

80 Q. As you put these two vessels there, the steamer having changed but from one-half to one point, would it not be necessary for these two vessels to have come into that position; would it not be necessary for your vessel to have kept off more than three points?

A. She might have, but I could not say.

Q. Would it not be necessary to have got off more than that to get her here?

A. I don't think it would.

Q. But, to the best of your recollection, that is the position in which they were?

A. Yes, sir.

Re-direct:

Q. You don't mean at all to be accurate about the steamer only starboarding half a point to a point, do you?

(Not answered.)

Q. Can you tell exactly that the steamer only went off half a point to a point?

A. I said I could not.

Q. That is a matter of judgement?

A. Yes, sir.

Re-cross:

Q. What you stated is your best judgement and recollection?

A. Yes, sir.

Adjourned till Tuesday, Oct. 30th, 1866, at 11 a. m.

81 Mr. McMahon stated that as Mr. Donohue had withdrawn his objection to the deposition of Leon Katzenberg, he would now read it. The deposition was then read.

Earle P. Booker, a witness for libellants, being duly sworn, testified:

Examined by Mr. McMahon:

Q. You are a mariner, are you not?

A. Yes, sir.

Q. Have followed the sea how long?

A. Eighteen years.

Q. What has been your capacity in the last few years?

A. For the last ten years, master of six vessels off and on, and steamers.

Q. Coasting vessels?

A. Yes, sir.

Q. Have you plied on the Potomac River?

A. Yes, sir.

Q. For how long a time?

A. For eighteen years off and on.

Q. Have you also any portion of that time, and, if so, what position, been connected with the steamboats, and in what capacity?

A. Yes, sir; I have been pilot and left in charge.

Q. Acting master?

A. Yes, sir.

Q. (Court.) On the Potomac River?

A. Yes, sir.

82 Q. (Libellant.) Did you know of any custom on the Potomac River during the war with regard to steamboats giving a signal to sailing vessels by whistle?

(Respondents objects. Taken subject to objection.)

A. Yes, sir; I have often done it myself.

Q. What is the custom?

A. I have been meeting sailing vessels tacking, and I have blown a signal to let them know which side I intended to go.

Q. What whistle?

A. One whistle to the right, two to the left.

Q. Was there a custom during the war to this effect?

A. Yes, sir; it was.

Q. (Court.) Was this confined to the war?

A. I can't tell you; I know nothing about the regulations of a steamer before the war.

Q. Just state to the court how it came that that custom was prevalent on the Potomac River.

A. That was put among the pilots by the quartermaster to shun collissions; we were inspected to see whether we knew these rules or not by a United States pilot commissioner, as we supposed they were; Mr. Muller, in Baltimore.

Q. (Court.) Were you in the employ of the government?

Q. (Libellant.) Do I understand you that those were the orders given to government vessels during the war?

A. Yes, sir.

83 Q. Just explain to the court whether or not there any necessity for the application of that rule on the Potomac beyond the river, and why.

A. There was the necessity for that, because the vessels were so thick; it needed rules or regulations or signals to shun collissions.

Q. Where there was nothing in the way, and a steamship meets a sailing vessel, the sailing vessel coming down the Potomac, the steamship going up the Potomac, and they get within a short distance, say 3 to 500 yards of each other, and the steamship blew one long blast, I want to know what that signal meant, as you understood it, in Febuary, 1864.

A. Go to the right.

Cross-examined by Mr. Donohue:

Q. You were examined in regard to all these rules you speak of by Mr. Muller?

A. Yes, sir.

Q. Did Mr. Muller approve of your knowledge—you whistle to a sailing vessel to go to the right or left?

A. Yes, sir.

Q. Mr. Muller was the supervising inspector?

A. Yes, sir; they told me so.

Q. And you swear this information and custom you speak of was in consonance of the rules which he examined you on?

A. Yes, sir.

Q. You are now testifying to what you and Mr. Muller agreed were the rules?

84 A. I am testifying to the rules and regulations of pilots in 1864.

Q. And Mr. Muller approved of your answers?

A. He asked me these questions; I answered them; he gave me my license?

Q. Did he give you the rules and regulations?

A. Yes, sir.

Q. You had those printed rules and regulations then in existence?

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84 A. I am testifying to the rules and regulations of pilots in 1864.

Q. And Mr. Muller approved of your answers?

A. He asked me these questions; I answered them; he gave me my license?

Q. Did he give you the rules and regulations?

A. Yes, sir.

Q. You had those printed rules and regulations then in existence?

A. Yes, sir.

Q. That license extended over what ground?

A. In the vicinity of Chesapeake Bay, including the rivers inside of Cape Henry.

Q. Which would include all the way up to Baltimore?

A. Yes, sir.

Q. And these were the rules you understood applied all over these?

A. Yes, sir.

Q. So that, according to the rules Mr. Muller examined you on, you considered that in meeting a sailing vessel you could blow one whistle, and she was bound to go to the right?

A. If the captain of the sailing vessel understood the signal.

Q. Did the rule depend on his understanding of the signal?

A. That I don't say.

If you met a vessel and blew one whistle, she was bound to go to the right?

85 A. She was not bound to, but it was a signal, if the officer of the deck understood it, which way we were going.

Q. Not for him?

A. If it was a case of necessity for him to alter his course.

Q. In ordinary cases you never understood any rule that allowed you to give the signal to go to the right or left where there was no necessity for the schooner?

A. No, sir; I have passed many a vessel and gave no signal.

Q. And these rules you speak of in regard to allowing one or two blasts to go to the right or left were only applied to cases of necessity?

A. If you think you are coming to narrow work.

Q. You think under those circumstances, if you gave such a signal, the sailing vessel was bound to obey it?

A. I don't know that she was; but if the captain of the sailing vessel understood his business he would know what way to go, and he would.

Q. You do think, he being an intelligent man, he was bound to obey your signal?

A. If he knew it.

Q. You have a certificate?

A. Yes, sir.

Q. How long did it run?

A. It was from the 28th of January to the 28 of July, 1864.

Q. What vessel were you aboard of at that time?

86 A. The Delia, and several other vessels during that time.

Q. That applied over the whole district of which you were pilot?

A. Yes, sir.

Q. You were not appointed pilot for any other district?

A. No, sir; only City Point.

Q. Which applied all the way over the water round the cape?

A. Yes, sir.

Q. Going down the Potomac, with a channel six miles wide and nothing but two vessels in sight all, would you consider you had authority under those rules to whistle to a schooner to go to the right?

A. It is owing to what way we had the wind.

Q. You being a steamer, I mean?

A. Yes, sir; there are a good many occasions.

Q. With a channel 5 miles wide, and only two vessels approaching each other 5 miles apart, you would consider, under certain circumstances, you had a right to whistle to go to the right?

A. Yes, sir.

Q. You say a long and short blast you would understand to mean the same thing?

A. No, we generally blow a long blast to go to the right.

Q. What was a short blast for?

87 A. That was only to call a deck-hand; it was merely a toot, not a blast of the whistle.

Q. What was a long blast?

A. To go to the right.

Q. And a short blast you know for no purpose except for a deck-hand?

A. For a deck-hand.

Q. Were those the rules and regulations you practiced under?

A. Yes, sir.

Q. Those were, according to your understanding, the printed rules?

A. I don't know that the short blast was in the rules; it is a thing we use on most every steamer, unless she has a bell for that purpose.

Q. When you are approaching a dock and want to call attention simply, what did you call it with?

A. Do you mean for an alarm?

Q. Yes.

A. 5 or 6 quick blasts.

Q. You did not as you approached, coming up the river, give a long blast to call attention?

A. No, sir.

Q. And never in coming up the river called attention to yourself from the dock, or anywhere, by giving a long blast?

A. No, sir.

Re-direct examination by Mr. McMahon:

Q. These rules between steamships and sailing vessels, I understand you, were principally applicable when they came in close quarters?

88 A. Yes, sir.

Q In such a case as that you understand the custom to be, that one long blast meant to go to the right and two to the left?

A. Yes, sir.

Q. Was that understood among sailing vessels on the Potomac generally?

A. Yes, sir.

(The court here states what he understood the witness to have said as to whistling.)

Q. Just state what you have to say with regard to what his honor says on that subject.

A. I say in meeting a vessel a long distance off, I have passed many a one and never blew any whistle, and I have passed them and thought the watch did not see me, and blew a blast to show it was my intention to go to the right, and if, in case of necessity, coming at close quarters, for the schooner to act at the same time.

Q. Suppose a vessel and steamer meeting under these circumstances, with a wide channel and 300 yards or more apart from each other, what would be the proper signal for an alarm in such a case as that?

A. Five or six quick whistles.

Michael Phillips, a witness for libellants, being duly sworn, testified:

89 Examined by Mr. McMahon:

Q. What is your occupation?

A. Well, I have followed the water for the last eleven or twelve years.

Q. In what capacity?

A. I have been pilot of steamers, mate of sailing vessels, and captain of them both.

Q. Captain of coasting vessels?

A. Yes, sir.

Q. Did you run on the Potomac River?

A. Yes, sir.

Q. How long?

A. What do you mean, piloting?

Q. Both capacities.

A. About eleven or twelve years; ever since I followed the water.

Q. Do you know of the existence of a custom on the Potomac River for steamers to signal sailing vessels by whistle?

(Respondents' counsel objects as before—taken subject to objection.)

A. I do, sir.

Q. (Court.) Go on and state what that custom is.

A. When two vessels are approaching each other—one a steamer, the other a sailing vessel—I have blown a whistle frequently to go to the right of them; one whistle to go to the right and two to the left.

Q. (Libellant.) When did that custom exist?

A. I don't know how long it existed; it was so when I was piloting; the way that we used to do.

Q. Were you a pilot in Febuary, 1864?

90 A. Yes, sir.

Q. On that river?

A. Yes, sir.

Q. A steamboat pilot?

A. Yes, sir; the steamer City of Troy.

Q. Do you know the origin of the custom?

A. No, sir; I don't know how it originated.

Q. Take a vessel, a schooner, coming down the river and a steamer going up the river at night-time, approaching within a short distance of each other, three to five hundred yards, and the steamer blows one long blast, what would you understand, under that custom, was the duty of the schooner to do?

A. I should consider for her to go to the right.

Q. That is, port her wheel?

A. Yes, sir.

Q. (Court.) Which?

A. Both vessels port.

Q. (Libellant.) You heard what the last witness said about alarm whistles; what is your understanding?

Alarm whistles, we blow 5 or 6.

Short blasts?

A. Yes, sir; anything is an alarm over three.

Q. Would you blow one long blast for an alarm under such circumstances as I gave you, meeting a vessel three to four hundred yards apart that way?

A. No, sir.

Cross-examined by Mr. Donohue:

Q. Would not one long-continued blast be an alarm?

91 A. If you keep on blowing 3 or 4 minuites.

Q. Would it not a minuite? Count 30 seconds.
A. Not for thirty seconds.
Q. Suppose you commence blowing a whistle, and wait till I give you the time; do you mean to say that a whistle continuing as long as that, (counsel holding his watch for thirty seconds,) would be a whistle to go to the right—as long as I have waited?
A. Certainly.
Q. How long would your boat run in that thirty seconds?
A. That would be according to how fast she was going.
Q. Suppose seven miles an hour?
A. She would be going quite a good little ways.
Q. Can you give us an estimate?
A. I can't exactly.
Q. Can you tell us whether she would go a quarter of a mile?
A. I don't think she would.
Q. Do you feel certain that she would or would not?
A. Thirty seconds for a quarter of a mile? I don't hardly think she would.
Q. Would she go an eighth of a mile?
A. I can't tell about that.
Q. You don't know whether she would go an eighth of a mile at the rate of seven miles an hour?
A. I could not say positively.

Q. Do you know whether she would go nine hundred feet, going
92 at the rate of seven miles an hour, in thirty seconds?
A. I can't tell about that.

Q. Can you form any idea of what rate she would go, fixing any rate in your mind, from seven to twelve miles an hour?
A. No; I cannot.
Q. What vessel were you on in 1864?
A. Steamer City of Troy.
Q. How long did you remain on her?
A. Nine months.
Q. And during all this time you considered it your priviledge, on blowing one whistle, to have the schooner go to the right and you go to the right?
A. Yes, sir.
Q. And that, in your judgement, was proper maritime navigation?
A. Yes, sir.

Re-direct examination by Mr. McMahon:

Q. Where did you get your license?
A. Baltimore.
Q. From the same district as the last witness?
A. Yes, sir.
Q. And these regulations and customs prevailed over your district?
A. Yes, sir.

Re-cross:

Q. And Mr. Muller, I suppose, licensed you?
Yes, sir.

93 Charles Gaskill, as witness for libellants, being duly sworn, testified:

Examined by Mr. McMahon:

Q. You are a mariner?

A. I am.
Q. Master of a vessel?
A. Not at the present time; I have been for the last ten years.
Q. What kind of vessels?
A. Well, I have commanded both coasting vessels and steamers.
Q. In what waters?
A. In South Carolina, during the war.
Q. Above Beaufort.
A. Yes, sir; Beaufort, S. C., Hilton Head; down as far as Jacksonville.
Q. In February, 1864, do you know of the existence of any custom?
M. DONOHUE. The same objection.
The COURT. Where do you confine it to?
Mr. MCMAHON. He will prove it to exist in Long Island Sound also.
WITNESS. It is the custom at the present time on Long Island Sound and in the East River also.
Q. Do you know of any custom existing in the waters that you have navigated for steamers to make signals by whistles to sailing vessels?
94 (Same objection; taken subject to objection.)
A. I do, sir; one blast of the whistle to the right, two to the left.
Q. For each vessel?
A. For each vessel to port her helm.
Q. That is, if going to the right?
A. Yes, sir.
Q. What waters have you sailed in?
Between here and Boston for the last six months; one of the Neptune steamers, the Glaucuss; previous to that I was in a steamer called the Harriet A. Weed; in command of her.
Q. On the coast of New Jersey?
A. South Carolina.
Q. Were you in February, 1864?
A. I was south; I lost my boat in 1864 on the St. John's River; blown up by torpedoes.
Q. You were south in 1864?
A. Yes, sir.
Q. When was that custom understood to operate, if at all?
A. It has during the whole war, to my knowledge; it is a custom; furthermore I can't say.
Q. Do you know of any reason why that custom was adopted?
A. I presume, to avoid collissions.
(Respondent objects.)
The customs of the Potomac River I knew nothing about during the war.
95 Q. You heard the question put to the other witnesses; a schooner coming down the river at night-time and the steamer going up the river at night-time approach within 300 yards, one long blast is given?
A. It is to go to the right, of course—the boats to port their wheels.
Q. Do sailing vessels understand that?
A. Yes, sir; the general part of the coasters at the present time understand those signals, to my knowledge.
Q. And did they understand them in February, 1864?
A. They did, sir; there might a few that did not, but the principal part of them, I presume, understand them; they are customs that we have been in the habit of using.

Q. With a steamer of that kind meeting a sailing vessel on the Potomac, or any river in that way, would you consider one long blast an alarm?

A. It might answer in both cases; it might be an alarm and it might answer to notify the schooner, to draw attention, and have them both put their wheels aport, but it is not considered simply to alarm.

Cross-examined by Mr. Donohue:

Q. Are you a pilot now?

A. I am.

Q. Got your license from whom?

A. From Captain Weeks, in Pine street.

96 Q. In this district?

A. Yes, sir; I have been licensed twice.

Q. You were examined to get that license?

A. To get those licenses.

Q. Under this rule?

A. Not speaking of the rule in regard to sailing vessels.

Q. You were not examined on that point?

A. No, sir; those are simply rules that we have adopted, partly——

Q. You believe the rule to be, that sailing vessels and steamers both understand, that when approaching one blast is to the right, two to the left, and you understand it is to be obeyed, and you expect the schooner is to obey?

A. Well, by them understanding it they can very often prevent collission.

Q. You understand that with an intelligent man in a schooner he would understand it, and you would expect to see him obey it, and you expect it would be obeyed, and you would act on the theory that it would be obeyed?

A. Yes, sir.

Q. That is your theory of navigation?

A. Yes, sir.

Libellants' counsel read in evidence the deposition of Edward
97 Hillyer. Cross-examination read by Mr. Donohue. Re-direct by Mr. McMahon, and re-cross by Mr. Donohue.

Libellants' counsel also read in evidence the deposition of Basil S. Willener.

John S. Fox recalled for libellants, and testified:

Examined by Mr. McMahon:

Q. What was the tide that day at the time of the collission?

A. Ebb.

Q. How fast does that run in the Potomac?

A. About 2½ knots per hour, I suppose.

Q. About this forecastle deck—how far back from the bow does it extend?

(Respondent objects that it has been already answered.)

A. About eight feet.

Q. How high up above the main-deck is this forecastle deck?

(Same objection.)

A. Near 4 feet.

Cross-examined by Mr. Donohue:

Q. Is it above or below four feet?

A. Below, if any.

Q. You were asked the rate of the tide there—you mean at this time where you were it was 2½ knots?

98 A. Yes, sir, at that time; there is a difference, of course, in the strength of the tide.

Libellants rest.

The following are depositions read on the part of libellants.

99 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this twentieth day of September, in the year of our Lord one thousand eight hundred and sixty- , I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, John Smith, to testify and the truth to say on the part and behalf of the libellant in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Benjamin F. Town is libellant against the steamer Western Metropolis, her tackle, &c.

And the said John Smith, being about the age of twenty-seven years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said John Smith, and he did thereupon depose, testify, and say as follows, viz:

I reside in the city of New York. I generally sail out of the port of New York. I have followed the water nine years. I am a sea-faring man. I expect to go to sea this afternoon or to-morrow. I have been before the mast and mate of coasting vessels. I have sailed on the river Potomac.

Q. Were you and are you now acquainted with the river?

A. (Objected to.) Yes, sir.

Q. Were you a hand on board the schooner Mary C. Town when she was sunk in the Potomac River the 10th of February last?

A. Yes, sir.

Q. State how long had you been aboard that vessel prior to her being sunk, and in what capacity.

100 A. About twenty days; an able seaman.

Q. Where were you at and just before the collision?

A. On deck.

Q. What was you doing on deck?

A. Walking fore and aft, abreast of the fore rigging on the main-deck.

Q. State whether or not you were looking out.

(Objected to.)

A. Yes, sir; I was on the look-out; that was what I was there for.

Q. State how many crew and officers you had at that time, and where were they at and before the collision.

A. Four crew and two officers—captain and mate; they were on deck.

Q. State what time of day or night the collision took place, and where was your vessel at the time she was sunk?

A. About 8 o'clock, or probably might be after. I hadn't seen the time. It was in the evening. Schooner was a mile and a half to the northward and westward of Blackstone Island, about one-third on the Maryland shore. I mean ⅓ from the Maryland and ⅔ distant from the Virginia shore, in the Potomac River.

Q. State how the wind was at and before the collision; also how the night was as to seeing object at a distance?

101 A. Wind was about W.N.W. I call that back; I should have said N.N.W., blowing about six to seven knots. Moon was about half an hour up, quite clear, except a little hazy on the water.

Q. Where was your vessel bound to?

A. Bound down the bay; I supposed to New York.

Q. How far off was the steamer when you first saw her?

A. About four to four and a half miles.

Q. In what direction was she coming?

A. She was coming right up the river on our weather bow.

Q. How many sails had you set then?

A. Six.

Q. On which side of your vessel did your boom swing?

A. Starboard side.

Q. Which side of your vessel did you call your weather side?

A. The port side.

Q. At that time, when you first saw the steamer, state how did she bear with reference to Blackstone Island?

A. I think she was below the island, to the southward of it.

Q. How long is Blackstone Island?

A. About three quarters of a mile.

Q. When you say she was to the southward of the island, do you mean she was between the island and the Virginia shore, or on the other side of the island; i. e., to the eastward of it?

102 A. She would have to be right abreast of the island to get between it and the Virginia shore. We were on the northward and westward side of the island, and she on the southward and eastward.

Q. Could you readily discern the steamboat when you first saw her?

A. We could see her lights; could not see the boat.

Q. State then the course of your vessel and the course of the steamer up to the collision between you and her?

A. Our course was about S. E. ½ E. I can't tell her course any more than by my judgment on my vessel; I judged she was steering about N. W. We kept our course till the steamer blowed her whistle; then we kept our schooner off; then he struck us on our port quarter, aft the main rigging. I then jumped on the steamer's anchor, and got on board the steamer.

Q. How far were you off from the steamer when she blowed her whistle?

A. 400 to 500 yards.

Q. At the time the steamer blew her whistle, how did she head as to your schooner?

A. On our weather bow; that is on our port side; she bore from off on deck on the port side.

Q. At that time where were you standing?
A. On deck, in the wake of the fore rigging.
Q. Did you hear any more than one whistle?
A. No, sir.
Q. State how it was blown.
103 A. A long whistle.
Q. What did you understand at that time that signal to mean?
(Objected to.)
A. I didn't know what the whistle meant;
Obj'd to. } but the mate of the vessel understood it; he
} thought, he said, to keep off; he said the
whistle was to keep off; he sung that out among all hands; captain and all hands were on deck.
Q. Up to that time had your vessel changed her course?
A. No, sir; not until we heard the whistle.
Q. How fast was the steamer going just before she blew the whistle?
A. I think she was going 12 to 14 knots an hour.
Q. Did you observe any change of course on the part of the steamer after her whistle was blown?
A. Yes, sir; I did. We commenced to lose sight of her port light.
Q. State what course that indicated.
A. It meant that she had her wheel to starboard.
Q. How far was the steamer off from your vessel when you observed this change of course on her part?
A. 300 to 400 yards.
Q. State how long the steamer kept that course.
A. 3 or 4 minutes.
Q. Did she keep it up to the time of the collision?
A. Yes, sir.
Q. Did you observe the steamer check her headway at all, and how far off?
104 A. Yes, sir; about 100 yards off.
Q. What did she do?
A. Stopped her wheels at 100 yards off.
Q. Suppose the steamer had not blown her whistle, but had kept her course to the N. W., and the schooner had not ported her helm—had kept her course—would the collision, in your judgment, have taken place?
A. No, sir; I don't believe it would; it would have been a narrow escape.
Q. Now, do I understand you to mean that it was a nice thing whether they would not have come together any way if the whistle had not been blown?
A. I don't believe they would. It would have been pretty close work.
Q. Might not a nautical man of good judgment differ from you at that time on that point?
(Objected to.)
A. Yes, sir; they might.
Q. Suppose the steamer, after blowing her whistle, had ported her helm instead of starboarding it, would the collision have been avoided?
A. Yes, sir; I think it might.
Q. Suppose after the steamer had blown her whistle, and after you had ported your helm, she had kept her original course, would the collision, in your judgment, have been avoided?
A. Yes, sir.
Q. What became of the schooner after the collision?
105 A. She filled full of water, and capsized.

Q. Was the bearing or course of the steamer at any time prior to the collision on the starboard side of the schooner?

A. No, sir.

Q. Suppose the schooner had starboarded her helm instead of porting it, and the steamer had kept her original course, would you have come together?

A. Yes, sir; I believe we would.

Q. Could the schooner, at a distance of 400 to 500 yards off from the steamer, have starboarded her helm so as to have got the schooner on the whether side of the steamer?

A. No, sir; I don't believe she could without hauling up on the wind, heading on the Maryland shore.

Q. Did you say sharp upon the wind?

A. May be I said so, may be I didn't; I mean sharp up on the wind.

Q. Would that have been a risky manouvre to have adopted?

(Objected to.)

A. Yes, sir.

Q. State what occurred when you got on board the steamer.

A. When I got on board the steamer, I mixed in among the steamer's crew; they were all

106 Objected to. { forward of the pilot-house; they got talking about the accident; as far as I understood, they left the blame upon the captain of the steamer. I learned from them that the mate, being on the forecastle deck, gave orders in the pilot-house to port the wheel, that there was a schooner ahead; captain getting into the pilot-house after that order, had countermanded it, and had the wheel put hard astarboard, and blowed his whistle.

Q. Did you talk with any of the officers of the steamer at that time?

A. I couldn't say, as I couldn't tell officers from men at that time.

Q. Did you talk about this with the mate or pilot?

A. Yes, sir; after we had come to an anchor, I talked with mate and pilot; they asked where we were bound and what was the schooner's name, and where she belonged and the captain's name; that is all I had with them.

Q. What was the name of the steamer that run into your schooner?

A. The Southwestern Metropolis.

Q. Did the steamer after the collision render any assistance to the schooner?

A. No, sir.

Q. Did she go right on?

A. Yes, sir.

Q. Did you join the schooner after the collision?

A. Yes, sir.

Q. Where was she?

A. On the shore, on Blackstone Island sand-flats; she had drifted ashore; I assisted in raising her; they were between two and
107 three weeks in raising her; she was then taken to Baltimore; she was made fast to a dock there and repaired, as I have understood; I left her at the dock.

Cross-examined by Mr. Donohue:

I am not now on board of any vessel; havn't yet shipped in any; havn't made up my mind what vessel I will ship in. It is now about three months and two weeks since I last came from sea; came then from

Fortress Monroe in the Ann S. Roe; since that I have been working occasionally a day along shore, and living with a friend of mine. I was a month and fifteen to twenty days in the Ann S. Roe; was before that ashore over a month.

Q. Will you swear that you were then ashore less than four months?

A. I can; I wasn't ashore over three months. I have followed the water or stayed ashore during these nine years, as I took a notion to; the most of it at sea—more than half. I earned my living going to sea. I have been trading to Alexandria and Georgetown three years, about four years ago. I can't say when I was last up the Potomac before this trip in the Mary C. Town. I made a trip there last January, 1864, in the Joseph H. Franklin, schooner. I can't recollect when before. The captain of the Mary C. Town always went by the name of Ted Fox; mate's name was Charles Leitz; the crew were two Georges, one
108 Johnny, and myself; that included the cook, Johnny. Can't say where cook was at the time I first saw the steamer; one of the Georges was at the wheel; the other George was to leeward of me on the main-deck. I saw the steamer's lights without hearing any one speak about them. I couldn't tell what kind of light it was at that time; I only observed one light at first. I think she was then four or five miles off; she was then about one point off our port bow. About ten minutes after—five to ten minutes after—I saw three lights on the steamer, a blue, red, and white. Once in a while I would see another light on her, but not steady. She got so as to bear abaft the main rigging to a man at our wheel, a couple of minutes before [before] she struck us.

Q. Did she get to bear so before she blew her whistle?

A. No, sir; nor before we changed our course. When she blowed her whistle she bore off the wake of our fore rigging to a man at our wheel; that would be about two points off our bow, or two and a quarter points. I didn't lose sight of either of the three lights until she blowed her whistle. I lost sight of one light; can't say whether it was red or green; it was her leeward light; didn't lose sight of that till she was 400 to 500 yards off; didn't see that again before the collision.

109 (Counsel asks witness to make a diagram of how the vessels came together. Objected to [objected to] as irregular and improper.)

The witness draws the following diagram:

G. F. B.

Our schooner changed her course about three points and half before the collision, after the blowing of the whistle. We were going as straight down the river as we could find our way. There was no change in the sails of our schooner after the whistle blew, before the collision, neither jib nor after sails. We had sails, the mainsail, foresail, two jibs, and two gaff-top-sails set. There was nothing done but what I have told on board our vessel after we saw the steamer's lights. We talked about

the lights; what they should be; concluded she was a steamer; nothing else said. We saw her hull 100 yards off. We had a top-gallant forecastle on our schooner; it came aft to five or six feet in the centre; we used to keep a piece of an anchor in there, and a couple of old sails; it was eight feet from the after end of that to the foremast. The Potomac is there S. E. ½ E., N. W. ½ W. The steamer didn't turn her wheels back at all before the collision. She has a walking-beam; saw it on her that night. I don't know the name of captain, mate, or either of
110 the men on the steamer. I went on board 8 o'clock that [that] evening; left her 2 p. m. next day. She anchored at below Lower Cedar Point, three or four miles off from where this collision occurred—nearest to the Maryland shore. She had a man they called the pilot; saw him in the pilot-house. We had no pilot on our vessel, up or down. Our schooner carried about 250 tons.

Re-direct:

I freighted three years steady to the Potomac, between Boston, Providence, Newport, Wareham, and Georgetown and Alexandria and Washington. That I commenced seven years ago, and stopped four years ago.

Q. Did that make you acquainted with the channel of the river?

A. Yes; there was a light on our vessel, underneath the jib-boom on the end of the bowsprit; I put it there myself; it was lit; I put it there before I saw the steamer's light—half an hour or twenty minutes before.

his
JOHN + SMITH.
mark.

Sworn to before me this 20th day of September, 1864.
GEO. F. BETTS, *U. S. Com'r.*

[U. S. internal revenue stamp, cancelled.]

(Here follows commissioner's certificate.)

111 (Endorsed:) 18—252. United States district court for the southern district of New York. Benjamin F. Town vs. the steamer Western Metropolis. Copy deposition on part of libellants, taken before George F. Betts, United States commissioner, on the 20th day of September, 1864. (John Smith.) Filed 21st September. 3ᴰᵒ. Ent. order.

112

113 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this seventeenth day of April, in the year of our Lord one thousand eight hundred and sixty- , I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled

"An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, John Roberts, to testify and the truth to say on the part and behalf of the libellants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York City, wherein Benjamin F. Town & others are libellants, against the steamship "Western Metropolis", her tackle, &c.

And the said John Roberts, being about the age of twenty-two years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said John Roberts, and he did thereupon depose, testify, and say as follows, viz:

I reside at No. 37 Market street, in the city New York. I am a seaman; have been about 8½ years. I have sailed out of a good many ports in the United States. I was a hand on board the steamship Western Metropolis, in February, 1864; I shipped in New York as a seaman. The vessel was bound from here to Alexandria. I was on board of her at the time of this collision with the Mary C. Town, schooner.

Q. Where were you standing at the time of the collision?

A. I was standing on the main-deck forward, about the mess-room or gallery.

114 Q. What first attracted your attention to the schooner?

A. What first attracted my attention was when the steamer's whistle blew.

Q. I had been standing on the main-deck by the gallery.

Q. For any length of time; if so, how long?

A. I had been standing there ten or fifteen minutes, I suppose; as near as I can tell.

Q. During that ten or fifteen minutes, had you heard any reports given to the pilot; and, if so, what?

A. Yes; I heard a man on the look-out report a sail twice.

Q. State when the first report was given; how long before the whistle blew.

A. It was about five or six minutes.

Q. What was the first report?

A. Sail, ho!

Q. Did you hear any answer from the pilot-house to that report?

A. No, sir; I didn't hear any.

Q. How near were you to the pilot-house?

A. The pilot house was almost directly over my head.

Q. Is it usual to have an answer given from the pilot-house to such a report?

A. Yes, sir.

Q. What kind of an answer?

115 A. They generally ask, "Where away?"

Q. How long a time elapsed before the second report was given?

A. About four or five minutes.

Q. What was the second report?

A. Just the same as the first, "Sail, ho!"

Q. Was any answer given to them?

A. I didn't hear any.

Q. What next did you hear?

A. I heard some one forward sing out, "Port!"

Q. Do you know how it was?
A. I don't know who the first man that sung out was.
Q. What next did you hear?
A. I heard the second mate sing out, "Port!"
Q. How long after the other "port?"
A. Almost instantly after.
Q. Was the second mate's "port" answered?
A. Yes, sir.
Q. In what way?
A. Some one from the pilot-house sung out, "Port," and ported the helm, I suppose.
Q. Did you perceive from the direction of the steamship whether the helm was ported?
A. Yes, sir.
Q. What next occurred?
A. I saw her answer enough to bring the vessel on her port bow.
Q. What vessel?
A. The schooner.
116 Q. What next occurred?
A. I heard the mate (the chief mate) halloo out, "Starboard."
Q. Who to and where from did he halloo?
A. He hallooed from the top-gallant-forecastle deck, and to the pilot, I suppose, or whoever was in the pilot-house.
Q. How long had he been there before this?
A. He just got there when he sung out.
Q. Where did he come from?
A. He came from under the hurricane-deck; I could say where.
Q. In what manner did he come?
A. He came running right forward after hearing the 2nd mate sing out.
Q. What next occurred?
A. The whistle blew.
Q. In what way?
A. One long blast.
Q. Was there any confusion on deck?
A. Yes, sir; a good many men running forward.
Q. What did you do?
A. I ran forward too.
Q. State where you went and what you saw?
A. I went just forward of the fore rigging and saw the schooner.
Q. How far off was the schooner at that time?
A. About four or five ships' lengths.
Q. How did the two vessels bear towards each other?
117 A. When I first saw them, the schooner was a very little on our starboard bow.
Q. About how far on your starboard bow?
A. About half or three-quarters of a point; I couldn't exactly say.
Q. Were there courses such towards each other, that if a line was drawn from their respective stems, would it cross each other?
A. Yes, sir; it would.
Q. Then do I understand you to mean that they were nearly head and head?
(Objected to.)
A. Yes, sir.
Q. When was this that you saw the schooner bearing this way; before or after the whistle?

A. Just before the whistle.

Q. Did you observe after this any change of course on the part of either vessel before the collision; and, if so, what?

A. I saw the schooner keep off, and I saw the steamer keep to port, and then to starboard.

Q. Was the hail of the first mate to starboard the vessel answered?

A. Yes.

Q. When did the schooner keep off; before or after the whistle?

A. After the whistle.

Q. At the time the whistle was blown, how fast was the steamer going?

A. About five knots—half speed.

118 Q. Was this speed slackened any up to the collision?

A. Not enough for me to notice.

Q. Was your way stopped?

A. No, sir; not enough for me to notice.

Q. What next did you see; that is, after you went forward of the fore-rigging?

A. I saw we were drawing pretty close on the schooner. I didn't go any further forward.

Q. What next occurred, if anything?

A. Just before she struck, all of us ran aft, and all the men off the forecastle.

Q. Did the two vessels come together?

A. Yes, sir.

Q. State how they came together.

A. Our vessel's stem struck her just abaft the main rigging on her port side.

Q. At the time of the collision, on what course were the two vessels, as near as you can state?

A. Our vessel was heading up the river about N. W. by west, and the schooner was heading down the river in nearly an opposite direction.

Q. How many points did the schooner keep off after the whistle was blown?

A. As near as I can judge, she kept off about two points before we struck her.

Q. On what tack was she when your vessel struck her?

119 A. The schooner was on the port tack.

Q. Did you see whether her boom jibed at or before you struck her?

A. No, sir; according to the way the wind was and she was steering, it couldn't have jibed.

Q. Did you see any jibing on her part?

A. No, sir.

Q. After you struck her, what next occurred?

A. We pushed her right ahead of us for about own length before we got clear of her.

Q. Did you render her any assistance?

A. No, sir.

Q. Did you see any man from her get on board your vessel after the collision?

A. Yes, sir; I saw a man come up on our port anchor.

Q. Did you have any talk with him?

A. No, sir; I didn't myself.

Q. Did he talk with others?

A. Yes, he talked with the crew.

Q. Did you hear what was said?

A. I don't remember anything, except that he said she would sink.

Q. Was the engine reversed before or after the collision?

A. It was stopped just before the collision; it was backed just after.

Q. How long a time elapsed between the whistle blowing and the collision?

120 A. About three or four minutes, as near as I can judge.

Q. What is your opinion as to the cause of the collision?

A. My opinion was the orders of the officers, one contradicting the other.

Q. What orders?

A. One officer ordering the wheel aport, the other starboard; the second mate ordered it aport, the chief mate ordered it starboard.

Q. Suppose the helm had been put astarboard instead of aport, and the whistle not blown, would the collision have occurred in your judgment?

A. No, sir.

Q. Which way was the wind?

A. About N., or N. by W. I couldn't come nearer than that to it.

Q. Was there any moon?

A. I don't think there was at that time of night. I don't recollect now.

Q. How clear was the night?

A. Clear enough to see a vessel off more than a quarter of a mile.

Q. Was it starlight?

A. Yes, sir.

Q. Did you see any light on the schooner?

A. Yes; I saw one bright light.

Q. Where was it?

A. Forward; I couldn't exactly say where situated.

121 Q. Suppose the mate had been on deck when the sail was reported, could he have avoided collision; and, if so, how?

A. He could have avoided it by ordering the helm astarboard, and we go to the leeward of the schooner.

Q. Whose watch was it on deck?

A. The chief mate's—the port watch.

Q. Whose watch had it been before the mate's?

A. Just before the chief mate's watch commenced all hands were on deck.

Q. How long had the chief mate's watch been called?

A. At the time of the collision they had been called about fifteen minutes.

Q. How many men did the steamer have at that time on the look-out?

A. One man; I forget his name; in fact, I never knew it.

Q. Did you know Joseph A. Jackson?

A. Yes, sir; he was quartermaster in the ship.

Q. Where was he at the time of collision?

A. I don't know exactly where he was. His watch was below. I don't know exactly whether he was on deck or below.

Q. Did you know Thomas Wood; and, if so, where was he?

A. I knew him. I don't know where he was. I didn't take

122 notice of all that were on deck.

Q. Were they getting out the anchor at and just before the time of the collision?

(Objected to.)

A. They cock-a-billed one anchor just about twenty minutes before

the collision. They didn't touch the other at all. It was the port anchor they cock-a-billed.

Q. How long had you sailed in steamships before the collision?

A. I had been in steamships steady then for nearly two years.

Q. Had you heard whistles blown by steam-vessels when meeting sailing vessels?

A. No, sir; not for sailing vessels.

Q. For what vessels do they blow their whistles?

A. They blow for other steamers, or else for fog.

Q. When they blow for other steamers, what is understood by one long blast?

(Objected to.)

A. It means for both vessels to keep to the right.

Q. Did you ever know, in your experience, a steamer meeting a sailing vessel and blowing a whistle, except in case of a fog, and this case?

A. Not as I can recollect.

Q. Was there any fog on this occasion?

A. No, sir; it was very clear.

Cross-examined by Mr. Donohue:

123 Q. You were a messman on this vessel, were you not?

A. Yes.

Q. How near were you to the door of the mess-room the time the first report of this vessel was made?

A. Not far from three or four yards from it.

Q. Which side of the deck is the door on?

A. Starboard side.

Q. Were you close to the house or to the bulwarks?

A. I was leaning against the bulwarks on the starboard.

Q. Up to what act of either vessel did you continue to lean against the bulwarks?

A. Until after the second mate's report to port the helm. The second mate was Mr. Gowan or McGowan.

Q. Was that before or after the whistle blew?

A. Before.

Q. How long?

A. It wasn't half a minute.

Q. Had you seen the schooner before that?

A. No, sir.

Q. Was the blast of the whistle quickly after that?

A. Almost immediately after.

Q. Did you then see the schooner?

A. I saw her then, and could see her all the time after that.

Q. How did she then bear from you?

124 A. A little on our starboard bow, very near ahead.

Q. Did you judge that your vessel ported her helm after that, by bringing the schooner on the port bow?

A. I could see that she ported her helm, by the schooner going so quick on our port bow, and she heading so near for us.

Q. Prior to this change of position of the schooner, how far was she off?

A. As near as I can judge, about three or four ships' lengths off.

Q. How much did you get her on your port bow?

A. About a point and a half; may be a little more.

Q. How far was she then off when you got her a point and a half on your port bow?

A. About two or three times our ship's length; I couldn't exactly say as to distance.

Q. That porting changed you so much to the northward of your course, did it not?

A. Yes, sir; our course being about W. N. W., as near as I can judge.

Q. Then your vessel was starboarded?

A. Yes, sir.

Q. How many points did your vessel change her course after that starboarding up to the collision?

A. I should think all of three or four points.

125 Q. Can you tell how long it will take, or what distance that steamer will run, to break a sheer one way, and make a change of one point in an opposite direction?

A. She will break a sheer and go one point in an opposite direction in her own length.

Q. How long will it take that vessel and what distance to break a sheer and go 3 or 4 points in the opposite direction?

A. It would take her as long a she would go three or four times her length, when she is going half speed.

Q. Which occurred first, the steamer starboarding or the schooner porting?

A. They occurred just about one time.

Q. How far was the schooner off when you saw she had ported?

A. I should judge about three or four times our ship's length.

Q. Where were you at that time?

A. On the main deck between the fore-rigging and the top-gallant forecastle on the starboard side, leaning against the rail, looking across the bow of the schooner.

Q. Was that where you had been leaning, as you first stated?

A. No, sir.

Q. How much further forward was that place than the one you first spoke of?

A. I suppose about fifty or sixty feet.

126 Q. Would that vessel change her course quicker or in a shorter distance at half speed than at full speed?

A. Not quicker, but while she would be making a shorter distance.

Q. How many times have you told to any one the story about this collision?

A. I couldn't tell. I dare say I have talked it over often since it happened.

Q. Did you ever state it to Mr. McMahon before you were examined here?

A. Yes, sir.

Q. Did you give him a written statement of it, or did he take a written statement?

A. He took it down in writing.

Q. When was that?

A. I couldn't say what date—about three or four weeks ago.

Q. Who took you to his office?

A. I went there myself; Mr. Town asked me to go.

Q. Where did you see him?

A. On West street, at his sail-loft.

Q. Who asked you to go there?

A. Nobody.

Q. Did anybody tell you he wanted to see you?

A. No, sir.

Q. How did you know where his place was?
A. I found out through this collision.
Q. How did you find out through this collision?
127 A. By talking to other people that knew where he lived. I couldn't say who it was told me where his office was; the first one, I believe, that told me where I would find Town's office was a clerk in Mr. McMahon's office.
Q. Had you been to Mr. McMahon's office before you went to Town?
A. I had been to his office, but I didn't see McMahon there. He wasn't there at the time. It may be a month ago or more.
Q. Who took you to Mr. McMahon's office?
A. Nobody; I found it out myself.
Q. Did any one go with you?
A. No, sir.
Q. Who did you find out from where McMahon's office was?
A. From a man in this court. I don't know who or what he is.
Q. Had you been to Mr. Brown's office before that?
A. I had.
Q. You didn't make any statement the first time you went to McMahon's?
A. No, sir.
Q. Did you make any statement to Mr. Brown (now present) about the collision?
A. Yes, sir.
Q. Didn't you ask him how you were going to be paid for your time?
128 A. No, sir.
Q. Didn't you tell him that the collision was caused by the schooner attempting to cross your bow?
A. No, sir.
Q. Didn't you tell him that the collision was from the schooner's fault?
A. No, sir.
Q. Didn't you say that the first you saw of the schooner she was crossing your bow?
A. I said she was a little on the starboard bow, crossing our bow, or we were crossing her bow, which was just the same.
Q. (Repeated.)
A. Yes, sir; I say, as I said before, she was a little on our starboard bow, and crossing our bow; that is, just when our vessel was answering her port wheel.
Q. Do you mean to swear that is what you told Mr. Brown?
A. I don't mean to say that is exactly the words I told him.
Q. Did you go anywhere with Mr. Brown after you talked with him?
A. To Mr. Donohue's office, but I hadn't then said a word to him about what I knew of the collision.
Q. Did you tell Mr. Donohue about the collision?
129 A. I answered him what questions he asked me about it.
Q. Did you not tell him the first you saw of the schooner was when she was crossing your bows after she had ported?
A. No; I did not in them words.
Q. Is that your signature?
A. Yes; it is my signature. (Marked G. F. B.)
(Mr. McMahon requests the right to see the paper shown to and identified by the witness, to which no reply is made by Mr. Donohue, and Mr. McMahon is thus unable to examine said paper.)
Q. Have you not been down to Mr. Brown's within the past two weeks?
A. Yes, sir.

Q. Did you not go down there and ask him when he would want you as a witness in this case?

A. Yes, sir.

Q. How long since you have been to sea?

A. I haven't been to sea on salt water for about a year.

Q. When you went down to Brown's the last time, was it not after you had made the statement to McMahon?

A. Yes, sir.

Direct examination resumed:

Q. What did you go to Mr. Brown's office for when he gave you notice of this case?

(Objected to.)

130 A. I went there to collect some prize-money that was coming to me from his ship.

Q. Did he give your prize-money without asking you what you knew about this collision?

A. No, sir; he took me up to Mr. Donohue's office first in the afternoon.

Q. Did he not tell you that he would pay you your prize-money when you had made a statement in Donohue's office?

(Objected to as leading.)

A. No; he didn't tell me that in those words, but he took me up to Donohue's office, and paid me after I had made the statement.

Q. Did he use any language towards you, which led you to infer that unless you made that statement you would not get your prize-money?

(Objected to as improper and leading.)

A. No; he told me to go up after Hughes, 33rd street, and when I came back he would give me my prize-money. Hughes had prize-money coming to him out of the same ship. I came back with Hughes. He told me to stop till four or five o'clock till Mr. Donohue would be in his office; then he took us up about five o'clock to Donohue's office, and took our statements. Thomas Woods and Lawrence Hughes were

131 examined there before me.

Q. Did you mentally agree with their statements?

(Objected to.)

A. No, sir.

Q. Were you examined at any length by Mr. Donohue; or what did he do after hearing Wood's and Hughes' statements?

(Objected to.)

A. He asked me a few questions, and I answered them, and signed my name to them.

Q. Did he check you before he finished your statement?

A. No, sir.

Q. Why did you not tell your whole story?

(Objected to.)

A. If I told all I knew about the collision, I knew my evidence would be against him; so I would not tell it. I wasn't asked to tell it.

Q. Was your going to see Town and Mr. McMahon a voluntary act on your part?

(Objected to as leading.)

A. Yes, sir.

Q. What prompted you to go there?

A. I went there to give them the true statement, as well as I knew about it.

Q. Do you know of any other hands on board that steamship at the

time of the collision, who are now in port or can be subpœnaed by us? If so, give their names and residences.

132 A. I know one here named Edward Hillyard; he lives at 47 Market street; and Mr. Cowan, the second mate; I don't know any other.

Re-cross-examined:

It was a week or two before Christmas that I received my prize-money; I never signed more than one statement in Donohue's office. I signed that before I got my prize-money. I am sure of that, and sure I never signed but one.

JOHN ROBERTS.

Sworn to before me this 17th day of April, A. D. 1866.

GEO. F. BETTS,
U. S. Commissioner.

133 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this second day of May, in the year of our Lord one thousand eight hundred and sixty- ——, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and caused to be and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Alexander Gavin, to testify and the truth to say on the part and behalf of the libellants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Benjamin F. Town and others are libellants, against the steamship Western Metropolis, her tackle, &c. And the said Alexander Gavin being about the age of twenty-two years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Alexander Gavin, and he did thereupon depose, testify, and say as follows, viz:

I reside at 37 Market street, New York; I am a sea-faring man; I am not expecting to go to sea; am working ashore at present.

Q. Where have you been living for some time past?

A. In the city of Chicago.

Q. Were you on board the steamship Western Metropolis in February, 1864?

A. Yes, sir; as able seaman.

Q. Did you see the collision between the steamship Western Metropolis and a schooner in the Potomac River, in that month?

A. Yes, sir.

Q. In whose watch were you at that time?

A. In the mate's; the chief mate's watch.

Q. About what time did the collision take place?
A. Between 8 and half past 8 at night.
134 Q. Where had you been prior to the collision?
A. I had been standing forward on the main-deck, on the starboard side.
Q. While standing there, did you hear any vessel reported?
A. Yes, sir.
Q. By whom?
A. By the man on the look-out.
Q. Where was he standing?
A. On the top-gallant forecastle.
Q. Did he report her more than once?
A. Yes, sir; twice.
Q. Was his first report answered?
A. I did not hear it answered.
Q. How long a time elapsed between the first and second?
A. About three or four minutes.
Q. Was the second report answered?
A. I did not hear any answer to the second report.
Q. Did you hear any order given at or about the time of the second report?
A. Yes, sir; by the man on the look-out; he ordered the helm aport.
Q. What next took place?
A. The second mate came forward and sung out, "Port!"
Q. Where did he come from?
A. I think he came from the hurricane deck.
Q. Was it his watch on deck?
135 A. No, sir.
Q. Was the order to "port" obeyed?
A. Yes, sir.
Q. What next took place?
A. The chief mate came forward and ordered the wheel astarboard.
Q. Where did he come from?
A. He came from aft; running forward.
Q. Was that "starboard" obeyed?
A. Yes, sir.
Q. Had you changed your position at all in the meantime?
A. Yes, sir; I had got on the top-gallant forecastle.
Q. Did you hear any whistle?
A. Yes, sir.
Q. Before or after the order to starboard was given?
A. Before.
Q. When did you get on the top-gallant forecastle, before or after the whistle?
A. Before the whistle.
Q. Had you the schooner in sight before the whistle?
A. Yes, sir.
Q. For how long?
A. About six or seven minutes.
Q. How far off was the schooner when the whistle was blown?
A. Some 300 or 400 yards.
Q. Just before the whistle was blown, how did the schooner bear; from or towards your vessel?
A. About ahead; a little on our starboard bow.
136 Q. Before the whistle was blown, had the schooner changed her course?

A. I did not notice any change in her course from the time I saw her till the whistle blew.

Q. Did you observe any change afterwards; and, if so, when?

A. Yes, sir; I noticed her keep to her right.

Q. How soon after the whistle was blown?

A. Right away; it may be about half a minute after the whistle blew before I noticed any change in her.

Q. How far off did she keep?

A. About a point and a half or two points, as near as I can judge.

Q. What next took place?

A. I saw the schooner and steamer come pretty close together; I got down off the top-gallant forecastle on to the main-deck; about half a minute after my getting down they struck.

Q. What was the result?

A. We struck the schooner on the port side about amidships, a little abaft; we took her ahead of us for about half our own length; then we backed; then we passed right on up the river about three or four miles and came to anchor.

Q. Did you stop to render any assistance to the schooner?

A. No, sir.

137 Q. How fast was the steamer going, up to the time of the collision?

A. Going at the rate of about 4½ to 5 miles—half speed.

Q. Was that speed kept up to the time of the collision?

A. No, sir; she was stopped a little before striking the schooner.

Q. To which do you refer, the way of the vessel or the engine?

A. The way of the engine.

Q. How long have you followed the sea?

A. Going on four years.

Q. Have you been on steamships during that time?

A. Yes, sir; part of the time.

Q. How long on steamships?

A. About a year and a half.

Q. Do you understand what is meant by the signal of blowing the whistle by a steamship when meeting a sailing vessel going in opposite courses?

A. It is meant to keep to the right.

Q. What is your opinion was the cause of the collision between these two vessels?

A. I think it was in the contradiction of our officers, the second mate ordering the wheel aport and the chief mate to starboard.

Q. If the steamship had kept on her port and not blown the whistle, do you think the collision would have happened?

A. No, sir; I think we would have went to windward of the

138 schooner.

Q. Did you observe any confusion on your vessel [vessel] after the order to starboard was given?

A. Yes, sir; the men all running down off the top-gallant forecastle, and some of them running aft under the hurricane deck.

Q. Did you see any jibing on the part of the schooner at or before they came together?

A. No, sir; I didn't notice any.

Q. Did anybody get on your vessel from the schooner?

A. Yes, sir; one man came up over our port bow on to our forecastle.

Q. Did he talk with you?

A. No, sir; he spoke to some of the men forward.

Q. How was the wind that night?

A. I couldn't say. I wasn't at the compass. I think it was about N. or N. by W.

Q. Did you observe any fault on the part of the schooner in bringing about this collision?

A. No, sir; I didn't notice any. After our whistle blew, she ported her helm and kept to the right.

Cross-examined by Mr. Donohue:

Q. Do I understand you that you understand it to be customary for a steamer meeting a [a] sailing vessel on opposite courses to blow one whistle to go to the right, and for a sailing vessel to follow that direction?

A. Yes, sir; that is always done if they do right.

139 Q. How long had you been running half speed when this vessel was reported?

A. For some time; I should say for a couple of hours.

Q. When the vessel was first reported, did you see her?

A. No, sir.

Q. When she was reported the second time, did you see her?

A. Yes, sir.

Q. Where were you then?

A. I was standing on the top-gallant forecastle.

Q. Could you see her from where you had been standing on the main-deck?

A. No, sir.

Q. Do you know Hillyer, one of the crew?

A. I know a man by that name that was aboard of her at that time.

Q. Did you see him just before you went on the top-gallant forecastle?

A. No, sir; I don't remember seeing him.

Q. State particularly where you were when you heard the first report.

A. On main-deck, a little abaft the forecastle door; about eight feet from the bulwarks; about 15 feet forward of the fore rigging.

Q. Did you go up on the top-gallant forecastle immediately on the first report?

A. No, sir.

Q. Did you wait till the second?

140 A. No, sir; I went up on the top-gallant forecastle about half a minute after the first report.

Q. How far was the schooner off then?

A. About 400 or 500 yards.

Q. How did she bear from you then?

A. About half a point on our starboard bow.

Q. Which side were her sails on then?

A. She was on her port tack; her sails were on her starboard side.

Q. From that time on was your attention directed to the schooner?

A. I watched the schooner, and the movements of our vessel and the orders of our officers.

Q. Could you form a judgment as to the changes of your vessel by the changes and bearing of [of] the schooner?

A. No, sir; not before the second mate came forward.

Q. Repeated and explained.

A. I could.

Q. Do you know how the tide was that night?
A. No, sir.
Q. About how many points did your vessel change on her port wheel before she starboarded?
A. About ¾ of a point, or thereabouts.
Q. How far off was the schooner when the steamer commenced her port change?
A. About 300 yards, or 350.
Q. About how far off was the schooner when the steamer commenced her starboard change?
141 A. About 3 or 4 of our vessel's lengths.
Q. What was the distance of the schooner off when the order to starboard was given?
A. About 5 or 5½ our vessel's length off.
Q. How many points to starboard did the steamer go before the collision?
A. I couldn't say. I wasn't at the compass. I judge about 3 to 3½ points.
Q. How long was the time between the whistle and the order to starboard?
A. Right immediately after the whistle blew.
Q. Was there no space of time between?
A. There may have been a few seconds.
Q. How long between the second report of the vessel and the order to port?
A. Just a few seconds. The man reported the sail, and sung out to port right after.
Q. How long between the order to port and the order to starboard?
A. There may have been near a minute.
Q. How long between the order to starboard and the collision?
A. About a minute and a half or two minutes. I couldn't say exactly.
Q. How long since you have been to sea?
A. About five months.
Q. What are you at ashore now?
A. Working in a saloon and grocery store in the city of Chicago. That is my present business.

Re-direct:

142 Q. What do you understand to be the rule when sailing vessels and steamships meet on opposite courses, and two blasts of the whistle are blown?
A. It means to keep to the left.
Q. Did you know Thomas Wood and Joseph Jackson on that vessel?
A. Yes, sir.
Q. Where were they at and before the collision?
A. I don't remember. I don't remember seeing them on deck about the time of the collision. ALEXANDER GAVIN.

Sworn to before me this 2d day of May, A. D. 1866.
GEO. F. BETTS,
U. S. Commissioner.

143 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:
Be it remembered that on this eleventh day of April, in the year of

our Lord one thousand eight hundred and sixty-six, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, William Geany, to testify and the truth to say on the part and behalf of the libellants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York City, wherein Benjamin F. Town is libellant against the steamer Western Metropolis. And the said William Geary being about the age of forty years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said William Geany, and he did thereupon depose, testify, and say as follows, viz:

I live in New York City, at 13 Rose street. I go to sea sometimes; I am not going to sea now; I have not lately shipped to go to sea. (Mr. Donohue objects to the examination.) If a good chance came up I would go to sea. I was last on the steamship Mississippi, but not at sea on her since Christmas. I always followed the water for a living as seaman; have been 2nd officer of three different ships. I was on the steamer Western Metropolis; went from here to Alexandria, then to New Orleans, and back here; I was on her when she came into collision with some schooner—I don't know its name—on the Potomac River, in Feb-
144 ruary, two years—I can't tell the day of the month—about 7 or 8 o'clock in the afternoon. I was able seaman at the time. At the time of the collision I was standing on the deck aft the forecastle 8 or 10 or 12 feet at abt the forecastle, on the port side. The first thing I heard was a man report the schooner. I was my watch on deck; I had been on deck 15 or 20 minutes since our watch was called. That watch commenced at 8 o'clock. My attention was first called to the schooner by the man at the look-out singing, "Sail, ho!" "Ahead." That is all I heard at that time. Then some men ran on the top-gallant forecastle, and the 2nd officer with them, and he sang out to the man at [the man at] the wheel to port the wheel.

Q. Was the wheel put aport?

A. Yes, sir; the mate was officer of the deck at that time, and it was his watch. He was not around the deck at the time the schooner was reported, that I saw.

Q. Did you see the first mate come on deck after the report of the look-out?

(Objected to.)

A. I heard his voice before I saw him.

Q. Repeated.

145 A. I saw him after.

Q. Where did he come from?

A. That is more than I can tell.

Q. Where did you see him?

A. Standing by the pilot-house, giving orders on the hurricane deck; he gave orders to starboard the wheel. The schooner was quite close then; she might have been, perhaps, two ships' lenths off when that order was given.

Q. Was the order obeyed?

A. Yes, sir; the order was obeyed.

Q. What then took place?

A. The next thing I saw she was knocking against the schooner; she struck the schooner aft the main rigging on the port side.

Q. Before the steamer came into the schooner, did you see any jibing on the part of the schooner?

A. I did not.

Q. Were you looking in that direction?

A. Yes, sir; my eyes were on the schooner all the time.

Q. You heard the 2nd officer give the order, "Port the wheel;" how far off was the schooner at that time?

A. She might have been 5 or 6 ships' lengths off perhaps; more or less; but I think not less.

Q. How did the two vessels bear towards each other at the
146 time that order to port the wheel was given?

A. The schooner about a point and a half on our starboard bow.

Q. Which way was the schooner heading; up or down the river?

A. She was coming down and we were going up.

Q. Was the order to port the wheel obeyed?

A. Yes, sir.

Q. Was there any effect resulting from putting the wheel of your vessel aport; and, if so, what [what] was it?

A. Yes, sir; it brought her head around.

Q. Did it have any effect in bringing the two vessels together; and, if so, what?

A. No, sir; that had no effect to bring the two vessels together.

Q. How fast was your vessel going when the order to port the wheel was given?

A. Going about half speed; about 5 or 6 knots.

Q. About how long was it after the wheel was put aport that the two vessels came together?

A. I don't know exactly; not many minutes.

Q. Suppose the steamship had kept on that course after porting her wheel, would they have come together?

A. No, sir.

147 In what direction would that porting the wheel have taken them?

A. It would have taken them clear of the schooner altogether.

Q. On which side of the schooner?

A. It would take the port side altogether.

Q. Suppose the steamer had not ported her helm, but kept on her course; would they have come together, in your judment?

A. No, sir; they would not have come together.

Q. Did you hear the whistle blowing from the——

A. Yes, sir.

Q. Was it before or after the order to port your wheel was given?

A. After.

Q. How far apart were the two vessels at the time of the whistle?

A. I could not exactly say, because she was reported; then the 2nd mate gave orders to port the wheel, and then the whistle blew.

Q. What sort of a blast?
A. A long blast.
Q. What do you understand such a signal to mean?
A. I don't know, sir; or did not know at that time.
Q. Have you learned since what it means; and, if so, what?
(Objected to.)
A. No, sir; I have not; I partly guess what it is; am not certain.
148 Q. Did you observe any change of course on the part of the schooner before the whistle was blown?
A. No, sir; I did after the whistle was blown.
Q. How far off were the two vessels at that time?
A. I could not exactly say; they were closing each other.
Q. Give us an idea how far apart?
A. Perhaps three or four ships' lengths.
Q. What was the change of course you observed?
A. I observed she tended her port helm.
Q. On what tack had the schooner been prior to that?
A. Her main boom to the starboard.
Q. Did you at any time before the collision observe her main boom swing over to larboard?
A. No, sir.
Q. Suppose the steamer's helm had not been put astarboard; would the collision have taken place in your judgment?
A. No, sir; it would not.
Q. Was your engine stopped?
A. I did not take notice whether the engine had stopped, but the speed was lessened.
Q. How fast was she going when she struck the schooner?
149 A. Pretty fast; don't know how fast; perhaps five knots; you can't stop those steamers easy.
Q. What was the effect on the schooner from the blow?
A. That is more than I know.
Q. Did your vessel stop to render assistance, or go on?
A. Went on.
Q. Did anybody get on board your vessel from the schooner?
A. Yes, sir; one man.
Q. Did you or any of the men talk with him?
(Objected to.)
A. Yes, sir.
Q. Did you hear any talk of this kind, viz: that your crew left the blame upon one of the officers or captain of the steamer in countermanding an order given to port the wheel, by putting it astarboard, after it had been aport, or anything to that purpose or effect?
(Objected to.)
A. I did not hear that spoken. I have been going to sea for 35 or 36 years.

Cross-examined by C. Donohue:

Q. Before being in the Missisippi, what vessel were you in?
150 A. I forget her name; I was in a propeller down at Savannah; the same captain that had the Missisippi had the propeller; the propeller's name was "Continental;" I left her three months before Christmas; before her I was in the steamer "Fulton;" it was 5 or 6 months before I went in the "Continental." I have a family residing in the city; have lived here very nearly twenty-one years. I never told this story about the collision to any one but to you, (meaning C. Dono-

hue;) never told it to anybody else, unless it be to some old shipmate; Mr. Brown was present when I told the story to you; you, C. Donohue, took down the statement; when it was taken down, John T. McGowan read it over to me; I signed it.

Q. Up to the time you signed that paper, had you seen Mr. D. McMahon, or any one to your knowledge from his office, or that gentleman (Mr. Town) now present, or told either of them [them] the story?

A. No, sir; never.

Q. Had you seen anybody from the schooner, or who represented her, or had any interest in her?

A. No, sir; and had never told the story to any such person.

Q. And so far as you know, they have subpœnaed you here, and
151 examined you here this morning without any previous knowledge of what you knew on the subject?

A. Yes, sir; without any knowledge. I know John Roberts; he is here.

Q. Did he come here with you?

A. I believe he was subpœnaed here.

Q. Did he come here with you?

A. He did, sir.

Q. Where does he reside?

A. I believe he resides in Market street; am not certain.

Q. Was the statement you gave to me the one I now show you, marked Ex. 1., J. A. O.?

A. Yes, sir.

The counsel, Mr. Donohue, asks that it be annexed to the deposition. (Objected to.)

It is admitted by the commissioner, and is hereto annexed, marked Ex. 1., J. A. O.

Re-direct:

Q. Did you read over this statement, now produced and identified by you, before you signed it?

A. No, sir; it was read to me by Mr. McGowan.

Q. Do you know whether he read it correctly or not?

A. I think he did, sir.

Q. Did you swear to it?

A. No, sir.

152 Q. Did he ask you to swear to it?

A. Yes, sir.

Q. What did you say to him in reply to his request to swear to it?

A. I said I would not swear to till I went before the commissioner.

Q. Did you promise to swear to it then?

A. I did not.

Q. What did he say to that?

A. I don't know; he went in the other room.

Q. Did he not say he was the commissioner?

A. I don't know about that; I forget it.

Q. Who took down that statement?

A. Mr. Donohue did.

Q. Was Mr. Brown there?

A. Yes, sir.

Q. Did Mr. Donohue examine you fully as to your knowledge about the circumstances of the collision?

A. No, sir.

Q. Did you tell him all you knew about it?

A. I did not.

Q. Why not?

A. Why, if he didn't ask me questions, why I did not answer them. Mr. Brown, Mr. Donohue, Roberts; nobody else that I saw.

Q. Did he ask you whether the schooner jibed her main boom?

A. No, sir; I believe not; I disremember whether he asked me that or not.

153 Q. I see nothing down in this statement about the steamer's starboarding her helm; did he ask you about that?

A. No, sir.

Q. Did he ask you anything about the first mate countermanding the order to port?

A. No, sir.

Q. Was Mr. Donohue in a hurry when he examined you?

A. I couldn't tell whether he was in a hurry or not.

Q. Did you ever see me, or any of my firm, about this case before you came up to court to-day?

A. Never, sir; not to my knowledge.

Q. Did you have any conversation with Mr. D. McMahon, or any one from his office, about this case, before you came up to court?

A. No, sir.

Q. Did you ever see Benjamin F. Town, or [or] any of the libellants about this case, or otherwise, before you were subpœnaed to come up here?

A. No, sir.

Q. Who did you suppose on whose behalf you were to appear when you were subpœnaed?

(Objected to.)

A. I thought Mr. Brown subpœnaed me.

Q. Did you go to Mr. Brown's office to ascertain it?

(Objected to.)

154 A. I did, sir.

Q. Did Mr. Brown tell you that he had subpœnaed you?

(Objected to.)

A. He told me he did not subpœna me, but brought me to Mr. Donohue's office; thought he might have done it.

Q. What did you do in Donohue's office?

A. I did nothing. I found that the supœna was not from him. I talked there who was going to pay me for my day's labor.

Q. Did they offer you any money there in Donohue's office?

(Objected to.)

A. No, sir.

Re-cross:

Q. Did you not tell Mr. Brown, in my presence, when at my office to-day, that you wanted somebody to pay you for loss of time?

A. Yes, sir.

Q. When Mr. McGowan read the statement over to you, did you not tell him, in addition to what you have stated you told him, that that was all you knew about the collision?

A. I don't believe I did. I don't know whether he asked the question or not.

Q. Did you not tell him that the statement was true?

155 A. I suppose I did tell him that the statement was true. I know who subpœnaed me. Mr. Town did it. I was subpœnaed at my house between 3 and 5 o'clock yesterday. By subpœnainng, I mean that Mr. Town had me subpœnaed. A boy subpœnaed me. Don't know him; no one was with him.

Re-direct:

Q. What loss of time did you refer to when you spoke in Mr. Donohue's office about pay?

A. I referred to this day's pay.

Q. What did you receive from the person that subpœnaed you?

A. One dollar and a quarter.

Q. Was any promises of any other pay made to you by Mr. Town?

A. No, sir.

Re-cross:

Witness produces subpœna, and offers it in evidence. Hereto annexed, marked Ex. Q, J. A, O.

WILLIAM GEARY.

Subscribed and sworn to before me this 11th day of April, 1866.

JOHN A. OSBORN,
U. S. Commissioner.

156 *Ex.* 1.—*J. A. O.*

William Geary, 13 Rose street, seaman; seaman on the Western Mertropolis at time of collision; first heard of the other vessel; was the look-out on the steamer. I was on the main-deck; sail ahead a little on the starboard. Second officer gave order to port; before the order to port I saw the vessel. I saw her a little on the starboard bow, about a point to a point and a half on our starboard bow. I was not in the wheel-house; saw our vessel come to port; then the schooner ported her helm and run into us. If she had kept on her course, we should have kept clear of her; she would have gone on our starboard side; she had no light on her; did not see what the effect on our vessel was. We were getting ready to anchor; had got the anchor off the rail; had begun to go slow before seeing her; can't say whether the engine was going ahead or not. I don't know—I was on the forecastle—whether the order to reverse was given or not; a long whistle was blown. I didn't know what it meant.

Sworn to before me this day of March, 1866.

WILLIAM GEARY.

157 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this third day of September, in the year of our Lord one thousand eight hundred and sixty-four, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office, at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Charles F. Letts,

to testify and the truth to say on the part and behalf of the libellant in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the at New York, in the southern district aforesaid, wherein Benjamin F. Town is libellant, against the steamship Western Metropolis, her tackle, &c., and the said Charles F. Letts being about the age of years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Charles F. Letts, and he did thereupon depose, testify, and say as follows, viz.:

I reside at Watertown, in the State of New Jersey; am a mariner; expect to go to sea, into the navy, this afternoon at two o'clock. In Febuary last I was on board the schooner Mary C. Town, as first hand; had been a month and ten days on board of her at that time; have followed the water off and on six years. I remember the collission that took place between the Mary C. Town and the steamship Western Metropolis. I was on board the schooner. The collission took place Febuary 10th last, about ten minutes before eight o'clock p. m., about
158 two miles above Blackstone, on the Potomac River, above Stone Island; two to three miles off the light-house—Blackstone Island light-house. I was on the forecastle deck when she struck us. I was looking out for the steamer.

Q. Was you on the look-out?

(Objected to.)

A. I was on the look-out. We were coming down the Potomac River, and we made a light on our port bow—a steamer's light—about the distance of 4 or 5 miles, and we kept her on her port bow, so that she ranged aft the main rigging to a man standing at the wheel. We got the distance of about 400 or 500 yards, when she blowed one whistle—a long blast. We then altered our course and put our wheel up—that is, aport, and kept the schooner off, and she did the same thing; went contrary to her signal. We couldn't get out of her way and she ran into us. She struck us aft our main rigging on the port side. The result of the blow was to capsize and sink us in about fifteen minutes. We were then about a mile from either shore. River is there 2 to 3 miles wide. Wind that night was about W. N. W.; about a seven-knot breeze. We had on board, at the time of collission, Captain Fox, three deck-hands, stewart, and myself. We were all on deck at time of collission.
159 Captain Fox was on deck; I couldn't tell exactly at what place. One of the hands had charge of the wheel.

Q. At that time, what did you understand to be the object of the whistle?

(Objected to.)

A. To go to the right.

Q. Did any conversation, and, if so, what, take place on the deck of your vessel in regard to that signal at that time?

(Objected to.)

A. I was asked at that time by the captain if that wasn't to keep off, and I told him it was.

Q. At the time of the blowing of that whistle, suppose the steamship had not given the signal, and you had kept on your respective courses, would you have come together?

A. She would have cleared us, and gone on the starboard side of us.

Q. On the starboard side of you?

A. On the port side of us.

Q. Did you mean to you, "On your starboard side or" she would have gone to the starboard?

A. She would have gone to the port side of us if she hadn't altered her course.

Q. At the time of blowing her whistle, how fast were you going in your vessel?

A. At the rate of seven knots. I couldn't tell how fast the steamship was going; I should think ten to fifteen knots.

Q. Suppose the steamer had not gone contrary to her signal, would the collission have taken place?

(Objected to.)

160 A. No, sir; we would have cleared her; if she hadn't blown the whistle, we should have cleared her.

Q. You stated before that the steamer, after blowing her whistle, went contrary to her signal; that is, she kept away too; suppose she hadn't done that, would the collission have occurred?

(Objected to.)

A. She would have struck us forward if she hadn't blowed her signal.

Q. So that you mean to say that whether she blew her whistle or not she would have come into you?

(Objected to.)

A. Yes, sir.

Q. Did you alter your course before the whistle was blown?

A. No, sir; not at all.

Q. Suppose the steamship had at the time of blowing her whistle put her helm hard aport, would the collission have taken place?

A. No, sir.

Q. Did you see any slowing of her speed on the part of the steamer before the collission?

A. I did not. After our vessel was struck we lowered our boat and got into it. The steamer didn't give us any help; she backed out, and then went on up the river.

Q. So you had to look out for yourself, I understand you?

(Objected to.)

161 A. Yes, sir; there was a little moon that night. The night was rather hazy; could see the distance of 5 miles; we had a light on our vessel, on the end of the bowsprit—a globe lamp; we had no cargo on board at that time. Our vessel was afterwards raised; twenty days afterward; she was towed into Baltimore full of water; I left her after she got to Baltimore, and havn't been on her since.

Cross-examined by Mr. Donohue:

I joined the schooner at Jersey City; she was on the same voyage at the time of the collission; went into the steamer from Jersey City; started outside the Hook and came back; head-wind W. S. W.; only went out once and came back; can't tell how long we lay in the stream; altogether three weeks, including the time we spent in trying to get out; we stopped at Fortress Monroe; stopped there one night; I had been up the Potomac River once before in the Eliza Hamilton, six years ago, as a hand. We had no pilot on board except the crew—on board the Mary C. Town; we went above Alexandria in the Mary C. Town, remaining there three days; we left Alexandria the morning of the collission; wind was

162 northerly and westerly when we left Alexandria; can't tell the exact point; wind was baffling that day; we had no pilot on board going down. The three deck-hands were—John Smith, a native of Ireland; George Clifford, from Mannahawkin, New Jersey; and George ———; I

don't know his last name; we called him Canada, because he was from there; all hands were on deck going down the river that day; I suppose it was about seven a. m. that we left Alexandria; we had finished taking out our cargo the day before; I don't know the distance from where we started to Blackstone Island; I should judge it was about seventy-five miles; wind, when I first saw the steamer, was W. N. W.; that was a fair wind for us; can't tell the course of the river there; can come within three points of it; I think about S. W. and S. E. (Mr. McMahon suggests that the witness means N. W. and S. E.) A. I mean to say N. W. and S. E.; that is the course from where we were up towards Alexandria for not more than an hour; I suppose not over 7 or 8 miles; I had been on the steamboat Jersey Blue before I went on this
163 schooner; three months on her as first hand; Wm. Jackaway was captain of her; it was 25 days after I left the Jersey Blue before I joined the schooner; I was in the side-wheel steamer Deleware before I joined the Jersey Blue; was quartermaster (or wheelsman) and 2nd mate on her; I left her 40 days before I joined the Jersey Blue; was on her 8 months and 3 days. During the 6 years I have been off and on going to sea, I have not been in any other business; have worked at one time 3 months on a farm; couldn't tell the course of the Potomac above the 7 or 8 miles above where the collission took place.

Q. Can you give us any idea?

A. I don't know as I can; can't tell what the course is below Blackstone Island. Barney Baker got the vessel up; owners employed him to do it. When I first saw the steamer I think she was 4 or 5 miles off; I was then about amidships; I was doing nothing particular more than on the look-out; was walking backwards and forwards on deck; walked as far aft as the house aft the main rigging on the windward side—the port side—the booms were off to starboard; I was on the forecastle
164 deck part of the time; part on the main deck; all over her; Smith was forward on deck—on the forecastle deck—part of the time; the forecastle deck is elevated 3 or 4 feet; Clifford was at the wheel all the time; Clifford was somewhere around on deck; I saw 4 lights on the steamer when I first saw her; the red, green, the bow light, and a light on her foremast or mainmast, I can't say which; I saw all of them when I first saw her; I believe the crew saw them before I did; I can't say which of them; one of the crew told me there was a light ahead; I can't say which one of them; it bore on the port side between the fore and main rigging; about two points off our port bow; I was not aft at the wheel from the time I first saw that light until the collission; captain was not, to my recollection; I don't think he was; he was part of the time on the quarter by the wheel, and part of the time amidships; the steamer got out so that she ranged a very little aft the main rigging on the port side to the man at the wheel before the whistle sounded; I went aft the main rigging to see how she ranged; I couldn't see but three of her lights at that time; the head light and one of the
165 colored lights, I can't say which it was, the red or the green; I can't remember which.

Q. Have you any distinct recollection of losing sight of the green light up to so ranging it?

A. No, sir; I couldn't tell. No change occurred in our sails until the collission. When I first saw the steamer's lights, we were about the middle of the river. I think the river is there 2 to 3 miles wide. After the whistle blew I should think we changed our course three points before the collission. We did nothing but keep on our course from the time we saw her till the whistle sounded.

Re-direct:

The Jersey Blue propeller had sails. First hand is equivalent to mate; he is the next to the captain.

Q. From the time you first saw the steamer's lights 4 or 5 miles off until she blew her whistle, did she at any time bear on the starboard side of your vessel?

A. No, sir; she did not.

Re-cross:

Moon was about an hour to an hour and a half high at time of collission. Our course was about down the middle of the river.

CHARLES F. LETTS.

166 Sworn to before me this 3rd day of September, 1864.

GEO. F. BETTS,
U. S. Commissioner.

[U. S. internal revenue stamp cancelled.]

(Here follows commissioners certificate.)

(Indorsed:) Vol. 18, page 252. United States district court for the southern district of New York. Benjamin F. Town vs. Western Metropolis, &c. Copy depositions on the part of libellant taken before George F. Betts, United States commissioner, on the 3rd day of Sept., 1864. Charles F. Letts. Filed the 3rd day of Sept., 1864. Ent. order.

167 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-five, I, John A. Osborne, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office, at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, William Clemenshaw, to testify and the truth to say on the part and behalf of , in a certain suit or matter of controversy now depending and undetermined in the district court of the United States, for the , at New York City, in the district aforesaid, wherein Benjamin F. Town et als. are libellants, vs. the steamship Western Metropolis, her tackle, &c.; and the said William Clemenshaw being about the age of twenty-one years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said William Clemenshaw, and he did thereupon depose, testify, and say as follows, viz:

I reside at Jersey City; I have shipped on the "Queen of the West," on a voyage to Richmond, Va. I was on the schooner Mary C. Town in

the month of Febuary, 1864. I recollect the collission between the schooner and the steamship Western Metropolis; I was steward on the schooner; the collission took place somewhere about 8 o'clock in the evening, on the 10th of Febuary, I think; we were on the Potomac River at the time; our schooner was bound to New York, going down the river at the time; the steamship was bound up the river. Just prior to the collission I was in the cabin until about two minuites before she struck. I was getting down in the cabin—had been down there
168 about one hour—the steamer blowing the whistle caused me to go on deck. It took me a few seconds to get on deck; when I got on deck I saw the steamer on the weather side of the schooner, and about 100 yards off, I should judge; the steamer was heading right for the main rigging of our vessel. George Clifford was at the helm of our schooner, Captain Fox was on the deck, three men before the mast, and the mate—six of us all told. The men before the mast and the mate were on the forecastle deck.

After I got on deck, I saw the steamer come down into us; she struck right abaft the main chain on her port side. The steamer was coming at a speed of 12 knots; I didn't see her slow or stop her speed until she run into us. She cut a hole into us six feet lengthwise on the deck, and three—i. e., she went into us six feet, and the hole three feet wide. The steamer's bow hit us; our vessel sunk; about twenty minuites in sinking. I tried to get aboard the steamer, but the captain sung for all hands to come back again. They all came back, except one, named John Smith; he remained aboard the steamer. The steamer's people sang out to us to get aboard, and she backed out and went up the river.

Q. Did the steamer's people stop their vessel and render you any assistance?

(Objected to.)

169 A. No, sir. The night was clear. The wind, I don't know how it was. I have been always a cook, and don't know anything about navigation. I lost my clothes that night; the other men lost their clothes also. This collission took place near Blackstone Island; could see objects at a distance about one mile off.

Q. Did the man Clifford stay at his helm up to the time the vessel struck?

A. Yes; I have followed the water about 8 years; I know nothing about navigation. I should judge the width of the Potomac River at the place of collission is about 4 miles. The Maryland shore was nearer to us than the Virginia.

Cross-examined by Mr. Donohue:

I don't know that anything was done on board of our vessel after I came on deck. The steamer struck us head on, but angling a little after. Don't know how long the steamer is. The schooner about 100 feet in length. I should judge the steamer was about twice the length of our vessel off when I came on deck. I think I could count 30 from the time I came on deck until the time the steamer came into us, and count them pretty quick. It took me not over three or four seconds to get on deck, and I put for the deck just as soon as I heard the
170 [the] whistle—one long whistle. I was going up on deck while I heard the whistle. The sails were off on the starboard side; i. e., the booms were off on the starboard side. I saw a white light on the steamer; don't remember seeing the red and green light. The vessel continued in the relative positions from the time I got on deck till the vessels struck. Nothing was done on either vessels that I saw up to

Re-direct:

The Jersey Blue propeller had sails. First hand is equivalent to mate; he is the next to the captain.

Q. From the time you first saw the steamer's lights 4 or 5 miles off until she blew her whistle, did she at any time bear on the starboard side of your vessel?

A. No, sir; she did not.

Re-cross:

Moon was about an hour to an hour and a half high at time of collission. Our course was about down the middle of the river.

CHARLES F. LETTS.

166 Sworn to before me this 3rd day of September, 1864.

GEO. F. BETTS,
U. S. Commissioner.

[U. S. internal revenue stamp cancelled.]

(Here follows commissioners certificate.)

(Indorsed:) Vol. 18, page 252. United States district court for the southern district of New York. Benjamin F. Town vs. Western Metropolis, &c. Copy depositions on the part of libellant taken before George F. Betts, United States commissioner, on the 3rd day of Sept., 1864. Charles F. Letts. Filed the 3rd day of Sept., 1864. Ent. order.

167 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-five, I, John A. Osborne, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office, at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, William Clemenshaw, to testify and the truth to say on the part and behalf of , in a certain suit or matter of controversy now depending and undetermined in the district court of the United States, for the , at New York City, in the district aforesaid, wherein Benjamin F. Town et als. are libellants, vs. the steamship Western Metropolis, her tackle, &c.; and the said William Clemenshaw being about the age of twenty-one years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said William Clemenshaw, and he did thereupon depose, testify, and say as follows, viz:

I reside at Jersey City; I have shipped on the "Queen of the West," on a voyage to Richmond, Va. I was on the schooner Mary C. Town in

the month of Febuary, 1864. I recollect the collission between the schooner and the steamship Western Metropolis; I was steward on the schooner; the collission took place somewhere about 8 o'clock in the evening, on the 10th of Febuary, I think; we were on the Potomac River at the time; our schooner was bound to New York, going down the river at the time; the steamship was bound up the river. Just prior to the collission I was in the cabin until about two minuites before she struck. I was getting down in the cabin—had been down there
168 about one hour—the steamer blowing the whistle caused me to go on deck. It took me a few seconds to get on deck; when I got on deck I saw the steamer on the weather side of the schooner, and about 100 yards off, I should judge; the steamer was heading right for the main rigging of our vessel. George Clifford was at the helm of our schooner, Captain Fox was on the deck, three men before the mast, and the mate—six of us all told. The men before the mast and the mate were on the forecastle deck.

After I got on deck, I saw the steamer come down into us; she struck right abaft the main chain on her port side. The steamer was coming at a speed of 12 knots; I didn't see her slow or stop her speed until she run into us. She cut a hole into us six feet lengthwise on the deck, and three—i. e., she went into us six feet, and the hole three feet wide. The steamer's bow hit us; our vessel sunk; about twenty minuites in sinking. I tried to get aboard the steamer, but the captain sung for all hands to come back again. They all came back, except one, named John Smith; he remained aboard the steamer. The steamer's people sang out to us to get aboard, and she backed out and went up the river.

Q. Did the steamer's people stop their vessel and render you any assistance?

(Objected to.)

169 A. No, sir. The night was clear. The wind, I don't know how it was. I have been always a cook, and don't know anything about navigation. I lost my clothes that night; the other men lost their clothes also. This collission took place near Blackstone Island; could see objects at a distance about one mile off.

Q. Did the man Clifford stay at his helm up to the time the vessel struck?

A. Yes; I have followed the water about 8 years; I know nothing about navigation. I should judge the width of the Potomac River at the place of collission is about 4 miles. The Maryland shore was nearer to us than the Virginia.

Cross-examined by Mr. Donohue:

I don't know that anything was done on board of our vessel after I came on deck. The steamer struck us head on, but angling a little after. Don't know how long the steamer is. The schooner about 100 feet in length. I should judge the steamer was about twice the length of our vessel off when I came on deck. I think I could count 30 from the time I came on deck until the time the steamer came into us, and count them pretty quick. It took me not over three or four seconds to get on deck, and I put for the deck just as soon as I heard the
170 [the] whistle—one long whistle. I was going up on deck while I heard the whistle. The sails were off on the starboard side; i. e., the booms were off on the starboard side. I saw a white light on the steamer; don't remember seeing the red and green light. The vessel continued in the relative positions from the time I got on deck till the vessels struck. Nothing was done on either vessels that I saw up to

the time the steamer struck. When the steamer struck we kept off. I saw her that night that she was the Western Metropolis. Did not see any name on her; never saw her before to my knowledge. I have seen her since, about six months ago, in Hampton Roads. I didn't know her that night. I didn't recognize her that night. When I got on deck I thought there would be a collission. The steamer's bow was running for our port side when I got on deck; our side nearly square to her.

Re-direct:

I saw the steamer the next morning. She was about six miles up the river at anchor—(objected to)—I think. The next morning after daylight she lifted her anchor and went up the river. I was about six miles from her the next morning. She was pretty much in the same
171 place where she struck. I saw John Smith three days after [after] the collission.

Q. How did you learn that the Western Metropolis was the name of the steamer that struck you?

(Objected to.)

A. I learned it from Smith. I did not talk with any of the men on board of the steamer; they threw a line down to us and told us to come aboard of her. The vessel I saw six months ago was the same vessel that struck us that night in question.

Re-cross:

After the vessel sunk I was in the yawl-boat all night, remaining by the schooner. I did not watch the steamer all night. I did not see the steamer anchor that night.

Q. Do you know of your own knowledge where the steamer went that night?

A. Yes, sir; she went about six miles to the northward of Blackstone Island. I could not see her there during the night. Did not lose sight of her lights, but lost sight of the steamer. Didn't lose sight of light that night; she had one light up all night; she had that same light she had when she struck us, the white light on her stern; when she passed us she had a light on the stern, up on a pole or flag-staff; that
172 she showed when her stern was to us, and didn't show until she passed us. Those two lights were the only ones I saw. Didn't see the one on her stem when she anchored. Her stem is at the forward end; comes up about two feet above her bulwarks; the light was set on that stem. The top of that stem from the water was about 18 feet.

Re-direct:

Q. Did you see any other steamer in that vicinity but the one you have described?

A. None other, till the next morning, when we saw the Jacob Bell; saw her about 9 or 10 o'clock the next morning.

WILLIAM CLEMENSHAW.

Subscribed and sworn to before me this 31st day of October, 1865.

JOHN A. OSBORNE,
U. S. Commissioner.

173 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this nineteenth day of June, in the year of our Lord one thousand eight hundred and sixty-five, I, George F.

Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office, at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Leon Katzenberg, to testify and the truth to say on the part and behalf of the , in a certain suit or matter of controversy now depending and undetermined in the district court of the United States, for the , at New York, in the district aforesaid, wherein Benjamin F. Town and others are libellants, against the steamship Western Metropolis, her tackle, &c.

And the said Leon Katzenberg being about the age of thirty-three years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Leon Katzenberg, and he did thereupon depose, testify, and say as follows, viz:

(Mr. Donohue appears on the behalf of the claimants to object to the taking of the deposition, and, before the witness is sworn, objects, 1st, That there is no affidavit or proof before the commissioner of the materiality of the witness' testimony, or of the necessity for taking it; 2nd, That there is no proof before the commissioner of the pendency of any suit with the above title; 3rd, That there is no proof of the residence of the witness; 4th, That the notice which was served on him and is hereto annexed does not contain either the necessity nor reason for the taking of the deposition, and is not directed to any one. Mr. McMahon
174 puts in evidence the original notice, with admission of service. Commissioner holds that he cannot decide upon the validity of the objection.)

The witness testifies: I was raised in Mannahawkin, in the State of New Jersey. I live in New York, when not in vessels. I am now chief officer of the propeller Empire. She is chartered by the government, and I don't know where she is going.

Q. Are you going out of port?

(Mr. Donohue appears for the purpose of saving his rights, and, until the question is decided upon the above objections, he requires the question above to be written out.)

A. Yes, sir.

Q. When?

A. Twelve o'clock to-day.

Q. Bound to sea?

A. Yes, sir.

Q. Were you on board the Western Metropolis on Febuary 10th, 1864?

A. Yes, sir.

Q. What where you doing aboard?

A. I was pilot of the steamship.

Q. Did you see the collission that took place between her and the schooner Mary C. Town that night?

A. I did
Q. Where were you just before the collission?
A. In the pilot-house.
175 Q. Which way was your vessel going?
A. Up the Potomac River.
Q. Which way was the schooner coming?
A. Coming down.
Q. How was the wind?
A. Northwest.
Q. How was the tide?
A. Ebb-tide.
Q. What time of day or night did the collission take place?
A. I think it was about 12 o'clock at night; I can't tell exactly.
Q. Now state the circumstances of the collission that you saw on that occasion, as you saw them.
A. We made her light ahead—the schooner's light—and thought it was a vessel anchored; in the first place, we steered right for her—for the light—until we discovered her sails; that she was a sailing vessel; and as soon as we discovered she was a sailing vessel we had got near her, and we put our helm hard astarboard, and our captain he went into our pilot-house and blowed one long blast; then the schooner kept off to the right—to her right—and the chief officer of our steamer told our captain and me to put our helm hard aport; the mate was then on the top-gallant forecastle; captain and me were in pilot-house;
176 after he sung out hard aport, our ship had no way on her, and wouldn't come up; so the sail vessel couldn't get clear of us; she kept hard off.
Q. Who was in the pilot-house all the time with you?
A. Two quartermasters and the captain; the quartermasters had charge of the wheel; captain had a hold of one side.
Q. Who gave directions for the management of the wheel?
A. The captain did at that time.
Q. When the mate cried out hard aport, did you put your wheel hard aport?
A. Only 2 or 3 spokes—she wouldn't come.
Q. Was any strong effort made to put it hard aport?
A. No, sir.
Q. What had the wheel been before that and for how long?
A. It had been hard astarboard for, I suppose, about five minuites.
Q. Did you want to put the wheel hard aport when the cry was given?
A. I had nothing to say; the captain had it in his own hands.
Q. Did you ask the captain to do so?
A. No, sir.
Q. Did you say anything about it at the time?
A. No, sir.
Q. Suppose the wheel had been put hard aport at the time the
177 mate cried out, could the collission have been avoided, in your opinion?
A. I think it would.
Q. How far off was the schooner when you first saw her light?
A. I think, by the time we run, she was about five miles off.
Q. Could you see objects distinctly on that night?
A. Yes, sir, very; it was a very light starlight night.
Q. What was the object of your making this signal with the whistle?
A. We blowed one long blast with the object, I suppose, for him to keep to the right.

Q. Was there any change in the course of the schooner prior to the blowing of the whistle?

A. No, sir.

Q. About how far off from your vessel was the schooner when you blew the whistle?

A. I suppose about 300 yards, as near as I could judge; seemed very close.

Q. Would you have come together, supposing that neither vessel had altered her course and you had not blowed your whistle?

A. No, sir.

Q. Would you have come very close to one another under those circumstances?

A. We would have come very close.

Q. Would it have been a tight rub?

A. About 200 yards' distance.

178 Q. Now suppose at the time you blew your whistle you had put your helm hard aport instead of hard astarboard, would you have come together?

A. No, sir.

Q. When you first observed the schooner sails, how far were you apart?

A. About 200 or 300 yards when we blowed our whistle; about two miles apart when we first saw her sails.

Q. When you first discovered her sails, how did your vessel head in regard to the schooner?

A. We were heading pretty much right for her; had her a little open on the starboard bow; just enough to see her light.

Q. Off of which of your bows did you see her?

A. Off of our starboard bow.

Q. Which of her bows could you see first?

A. Could see her port bow first.

Q. How far were you apart when you put your helm hard astarboard?

A. I suppose about 200 or 300 yards.

Q. What had it been before you put it hard astarboard?

A. About the usual way—amidships.

Q. Suppose you had left it amidships, would the collision have occurred, in your judgement?

(Objected to.)

179 A. No, sir.

Q. How fast were you going at the time of the collission?

A. About three knots.

Q. Had you stopped your vessel?

A. Stopped; but no stern-way; she was going ahead; we had stopped our engine.

Q. How many tons burthen is your vessel?

A. Twenty-five hundred, they told me.

Q. How wide is the river there?

A. About nine to ten miles.

Q. Near what island was it?

A. About three to four miles above Blackstone Island.

Q. What was the result of collission to the schooner?

A. We cut her through aft the main-rigging; she water-logged, and we went right on.

Q. Which side of the schooner did you strike?

A. Her port quarter aft the main rigging.

Q. Did you go right on without rendering her any assistance?

A. Yes, sir.

Q. Do you recollect a man getting aboard from the schooner?
A. Yes, sir.
Mr. Donohue being present does not cross-examine the witness.

LEON KATZENBERG.

180 Sworn to before me this 19th day of June, 1865.

GEORGE F. BETTS,
U. S. Commissioner.

Here follows the commissioner's certificate.
Deposition filed & order to file entered June 19th, 1865.

181 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this twenty-third day of April, in the year of our Lord one thousand eight hundred and sixty-six, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office, at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Edward Hillyer, to testify and the truth to say on the part and behalf of the libellants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the , at New York, in the district aforesaid, wherein Benjamin F. Town and others are libellants, against the steamship Western Metropolis, her tackle, &c. And the said Edward Hillyer being about the age of forty-four years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Edward Hellyer, and he did thereupon depose, testify, and say as follows, viz:

I am a sea-faring man since 1835; I expect to go to sea; I can't tell the moment when I expect to go to sea.

Q. Were you on board the steamship Western Metropolis in Febuary, 1864, when she came in collission with the schooner on the Potomac River?
A. Yes, sir.
Q. What were you on board?
A. A seaman.
Q. How long had you been on board as seaman?
A. I can't say exactly; I shipped in New York that same voyage.
Q. Where you at the time the two vessels came together?
A. I was then on the top-gallant forecastle.
182 Q. How did they come together?
A. By the steamer coming on the top of the schooner.

Q. How long had you been standing on the top-gallant forecastle prior to the collission?

A. About two minuites.

Q. Where had you been before that?

A. On the main deck, abaft the top-gallant forecastle.

Q. Did you hear any reports of the schooner from the man on the look-out before the collission?

A. Yes, sir; that was what made me jump on the top-gallant forecastle to see her.

Q. What reports did you hear?

A. Sail, ho!

Q. More than once?

Once; and then 2 or 3 minuites afterwards, sail ho! again.

Q. Was the first report answered?

A. No, sir.

Was the second one answered?

A. It was answered by the second mate; he jumped on the top-gallant forecasle and sung out, "Port! Port!"

Q. Was that answered?

A. It was answered by the man at the wheel.

Q. Did he put his wheel aport?

(Objected to.)

A. Yes,. sir.

Q. At that time did you see the schooner?

183 A Yes, sir.

Q. How did she bear with reference to the steamer; that is, before the "port" was hailed by the second mate?

A. It appeared to me as if they were coming stem on.

Q. What next did you hear, if anything; that is, after "port" was cried by the second mate?

A. Next I heard was, "Starboard! Starboard!" by the mate.

Q. Where was he standing at the time he cried, "Starboard?"

A. I rather think he had just come out of the mess-room; the second mate's voice brought him out, I think.

Q. Was the "starboard" answered?

A. Yes, sir.

Q. How?

A. By putting the helm astarboard.

Q. Did you hear a whistle blown?

A. Yes, sir.

Q. When was that blown?

A. It was blown about the same time as the call "starboard."

Q. About how far off was the schooner when the cry of starboard was given by the first mate?

A. I should say about twice her length.

Q. Did you observe the schooner change her course?

184 A. Not till such time as the whistle blew.

Q. Up to that time had she kept her course?

A. I rather think she had.

Q. Did you observe any light on her?

A. Yes.

Q. On what part of her?

A. Somewhere about the foremast.

Q. What kind of a light?

A. I should say oil; it was a bright light.

Q. How long after the whistle was blown was it before they came together?

A. About five or six minuites.

Q. Did it take five or six minuites to go that two lengths of the schooner off?

A. I expect it did, sir.

Q. Where did the steamer strike the schooner?

A. Abaft the main rigging, on the port side.

Q. What sort of a shock was it?

A. She went right into the schooner.

Q. What became of the schooner?

A. I don't know what became of her; I didn't stop to look. The ship didn't stop to look.

Q. From what you saw, what do you consider the cause of the collission?

(Objected to.)

A. I believe if the port wheel of the steamship were kept she would have gone clear, and that starboarding her wheel caused it.

Q. Have you anything to say about the whistle in that connection?

(Objected to.)

185 A. I don't understand anything about the whistles at all. It is not customary to whistle to sailing vessels.

Q. Who was the officer of the deck on your vessel at that time?

A. The first officer.

Q. Had the second mate any watch on deck at that time?

A. It was his watch below.

Q. How far off did the schooner keep when she changed her course when the whistle was blown?

A. I don't believe she could have kept off more than 2 or 3 points in that time.

Q. Did you see anything on the part of the schooner which she could have done to have avoided the collission, at any time?

A. No, sir; I do not.

Q. Suppose the schooner had not kept away after the steamer starboarded her wheel, would the two vessels have come together?

A. Yes, sir.

Q. Was there much uproar on deck just before the collission?

A. There was considerable altercation between the two officers about giving the different orders; one "port," and the other "starboard."

Q. Did that attract the attention of the men?

(Objected to.)

A. I know it attracted mine; and they were all running here and there about the deck.

186 Q. Did you see the captain?

A. I can't say whether I did or not.

Q. How fast was your vessel going when the first hail was given about the schooner?

A. About eight knots.

Q. How was the wind?

A. Between N. and N. W.

Q. Did the schooner jibe her main boom?

A. No, sir.

Q. How was the night as to distinguishing vessels at a distance?

A. It was a bright night; could see a vessel cleverly six miles off.

Q. How far off was the schooner when you first saw her sails?

A. When the look-out sung out, she was about six times her own length off.

Q. How long a time elapsed between the first report of the schooner and the collission?

A. I should say about nine or ten minuites.
Q. During that time did you have the schooner in sight?
A. Yes, sir.
Q. Did you during that time observe her course?
A. I couldn't tell her course by compass; I wasn't near the compass.
Q. Repeated.
A. Yes, sir.

Cross-examined by Mr. Donohue:

187 I came ashore last on the 23rd Febuary; I then left the steamer Marmion; I went to New Orleans in her; I left her because I didn't care to stop longer in her.

Q. Were you not turned out of her for being drunk and raising a disturbance?
(Objected to.)
A. No, sir; I have shipped in a vessel since.
Q. In what vessel?
A. I decline answering that question.
Commissioner rules that witness must answer the question, unless he declines upon the ground that the answer will subject him (or tend to subject him) to a criminal prosecution. Mr. McMahon objects to this ruling.
Witness proceeds—
The answer will not subject me to any criminal prosecution. I have shipped in the steamship Columbia.
Q. Where is that vessel?
A. I can't tell now where she is; she was yesterday in the port of New York; I was last on board of her yesterday, about half-past three in the afternoon; she laid then at the foot of Conover street, Brooklyn; a watchman shipped me in her; his name is O'Neal; don't know his first name; he shipped me in the boarding.house, 47 Market street; he

188 told me he was a watchman on that vessel; he shipped me to go to work on that vessel; on no particular voyage; I expect that vessel is bound on a voyage to Galveston; I left her Thursday, but expect to go in her, and to Galveston; I have been connected with her since Thursday.

Q. Are you under any oath not to betray where you are going?
A. I am under no oath; I didn't state Saturday that I was.
Q. Did you ever tell anybody that you were under oath not to betray where you were going, or in whose employ you were?
A. I did—to the commissioner; I told him I belonged to a society that I wouldn't tell him anything about; but I said nothing about the vessel.
Q. About what wouldn't you tell the commissioner?
A. About what society I belonged to.
Q. Had the society or that obligation anything to do with your going away?
A. I am waiting on it.
Q. Waiting on what?
A. Waiting for work.
Q. From what?
A. From whoever will employ me.
Q. What has that to do with the society or obligation you mentioned to the commissioner?
A. Nothing.
Q. Do you mean to swear that you did not tell the commissioner (Mr.

Osborne) that your going away depended on the order or direc-
189 tion of the society to which you belonged, or words to that effect?

A. I told the commissioner that it did depend on it; that I was in a boarding-house; that I was liable to be called on, like all other seamen, any moment to go to sea.

Q. Did you not tell the commissioner (Mr. Osborne) that you were bound by an oath or obligation not to divulge or tell where you were going or when, or words to that effect?

(Objected to because answered before an irrelevant.)

A. I did not mention anything about an oath.

Q. Repeated, substituting "promise or obligation" for "oath."

A. Yes, sir.

Q. Have you had any difficulty with Captain Hilton?

(Objected to as irrelevant.)

A. I thought I came here as a witness in this case. I have had a difficulty with Capt. Hilton. He put me in irons on board his vessel; he did not put me in prison when he got to New York; I was put ashore from the vessel in New Orleans; I knew what it was for—for abuse; I never heard any other reason; I didn't hear that it was because I made an attack on the mate. He put me in irons for my abuse of him; I never sued him for putting me in irons or putting me ashore. He put me in irons again on the passage home; I wasn't shipped again in New Orleans to come home; he put me irons because I wouldn't pass coal;
190 I sued him when I got here; I was standing on the main-deck when I heard the report of the schooner; prior to that we had been getting the chains ready, and anchor ready. One of the quartermasters was at the wheel; couldn't say which; I believe the pilot was in the pilot-house too, but I can't say positively; don't know whether any one else was there or not. I am certain that the order which the mate gave, which was answered by the man at the wheel, was to "starboard;" no one but the second mate sung out to "port," that I am aware of. I went up on the top-gallant forecastle immediately when I heard the sail reported; can't say whether steamer was then running full speed; I don't think she was; she didn't stop her engine at all, to the best of my judgement, before the collission. When I first saw the schooner she bore directly ahead, stem and stem; I could see her sails then; she continued to bear so until the second report of sail ho! and the order given to "port:" I think her light was on the port side of the mast, if any side—about midway from deck to masthead; her sails were on her starboard side; her next bearing was on our port bow, about a point and a half; she was about three times her own length off when the bearing was changed from right ahead; she was three times her own length off when she bore a point and a half off our port bow; that was the nearest
191 she was to us while a point and a half off our port bow. Her sails remained full up to the collission. When our whistle blew she was off our port bow—about two points off—about twice her own length off. From that time up to the collission I can't tell how many points our vessel changed—about three points. I didn't continue to watch the schooner from the forecastle deck till the collission; I ran off from it when I saw them going to strike each other; I had continued to watch the schooner steadily from the time I went on the forecastle up to the time I saw they were going to strike. We changed about a point and a half on our port helm.

Re-direct:

Q. Does your difficulty with the captain at all affect your mind in giving your testimony about this collission unfavorably to the defence?

A. Not in the smallest; I am more put out to have to attend here every day, when I ought to be looking out for something; I have been attending here under subpœna, and my fees paid.

Re-cross:

I saw one of the crew of the steamer to-day; don't know his name; he was a messman. I was arrested by the captain here in New York; he had it for larceny on the high seas. I had him arrested prior to that, and while in court on that proceeding, I was arrested, and bailed out in an hour and a half; the captain was then gone.

192 Q. Were there not boots and shoes taken out of your clothes-bag, which, it was claimed, belonged to the cargo?

A. There was none.

Re-direct:

Q. What was the ill usage for which you sued?

A. For assault and battery, and being confined between two furnaces, where I could not stand straight forward between them; I was arrested while attending the marine court. (I produce this subpœna ticket.)

Re-cross:

I reside at 47 Market street; I have a wife; she does not reside there; she resides in New York. I think at 303 Front street; she resided there a week ago; I have no knowledge of her having left there.

EDWARD HELLYER.

Subscribed and sworn to this 23rd day of April, A. D. 1866, before me.

GEORGE F. BETTS,
U. S. Commissioner.

193 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this twelfth day of December, in the year of our Lord one thousand eight hundred and sixty-five, I, John A. Osborne, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States." passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Basil S. Willener, to testify and the truth to say on the part and behalf of the in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the at New York City, in the district aforesaid, wherein Benjamin F. Town et al. are libellants, and the steamship "Western Metropolis," her tackle, &c., are respondents.

And the said Basil S. Williner being about the age of forty-four years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy

aforesaid, I did carefully examine the said Basil S. Williner, and he did thereupon depose, testify, and say as follows, viz:

My business is ship-building and repairing ships. In Febuary and March, 1864, I was ship-carpenter and repairing vessels. The name of my firm was "Cooper and Slicer," at that time; place of business, East Baltimore, Maryland, corner of Philpot and Will streets. I expect to go to Baltimore to-night; I reside there. I recollect the schooner "Mary C. Town" being brought to our railway to be repaired. It was on the 6th of March, 1864. She was brought by the Captain Fox and wreckers. Her condition when brought there was pretty much of a wreck on the after-part. She had been under water and full of water—sunk to the rail. I observed injury to the vessel when she was
194 first brought there. She looked as if she had been run into by some steamer or sailing vessel. She was cut down under water to about 3½ feet below the ballast-line. The decking, from the after-hatch and the cabin, and the stern and part of the port plankshire was all washed away—gone. The vessel was run into on the port side.

(Objected to.)

Q. Which part of the port side—forward or aft?

(Objected to.)

A. Aft the main rigging.

Q. What sort of an injury appeared to be made on the port side aft the main rigging?

(Objected to.)

A. The injury looked as if it had been made by a steamboat running into her, which would cause her to sink.

Q. What was the shape of the hole made into her?

A. I could not give any direct answer about that.

Q. Give us the best answer you can.

(Objected to.)

A. It looked like a vessel had run into her and made a hole in her; that is all I can say about it.

Q. How deep into the vessel had this injury been made?

A. I could not come directly to that question.

Q. State as near as you can.

A. I judge about 4 feet.

Q. How far down did that 4 feet extend?

195 A. It cut down about 3¼ feet below the ballast-line; that is all I can say.

Q. Was it cut in that distance from the top of the rail to 3½ feet below the ballast-line?

A. I don't understand the question.

Q. Question repeated.

A. It was cut in that distance from the deck down that distance to 3½ feet below the ballast-lines.

Q. State whether or not the timbers was in a sound condition other than the injury.

A. Timbers was sound.

Q. Have you seen cases of vessels that had been injured by a collission?

A. I have, but can't tell what they were now. I have followed ship-carpentering since 1837.

Q. Have you repaired vessels that have been injured by collission?

(Objected to.)

A. We have.

Q. Give us your opinion whether or not that injury could have been done without the vessel which did it was under considerable way.

(Objected to.)

A. No, sir.

Q. State, if you please, whether or not it is your opinion that that injury was done by a direct blow or a glancing blow.

(Objected to.)

A. It was a little of a glance.

196 Q. What made you think that injury was done by a steamship?

(Objected to.)

A. I didn't say so. I said a steamship or sailing vessel.

Q. Can you state whether or not, in your judgement, such an injury could have been done to the Mary C. Town by her running her side on to a steamship?

A. No, sir.

Q. Would it require, in your judgement, in order to do that injury, considerable force to do it?

A. Yes, sir; I can't tell how long the vessel was under repairs at our place.

Q. State as near as you can.

A. About five weeks.

Q. State what you did to her?

A. We hauled the schooner "Mary C. Town" on railway, and put in four ribs and planked the outside and inside, and put two streaks of clamps in; put beams in, horizontal knees; put counter timber or stern timbers; put plankshire on her port and starboard sides; put deck from mainmast aft, and fastened all what was required; planked the stern inside and out; made a rudder and hung it; repaired cleets about deck where they had been knocked off. There was some other little work I can't recollect now.

197 Q. Did you caulk her or paint her?

A. We caulked her but did not paint her. She was on the ways 10 days. The total amount of our bill was $3,132 00.

Q. Did you include in your bill the ship-chandler, sail-maker, or painter?

(Objected to.)

A. No, sir; but a bill was rendered by my partner to Captain Fox, which will speak for itself.

Cross-examined by Mr. Donohue:

I didn't see this collission. I first saw the vessel on the 6th of March, 1864, at East Baltimore. At that time her deck was gone from the after-hatch aft to the stern. I can't tell you how many vessels I have repaired that have been in collission; have kept no particular account of them. I had seen more of the collissions of the vessels I had worked on. I supposed the blow had angled a little aft. The deck-beams were not all gone along where the deck was gone. I am positive that all the timbers were sound where I put the four. I am as certain of that as any other fact I have testified to.

Q. Do you think you could be mistaken about it?

A. I don't know that that is a fair question.

Q. Question repeated.

A No, sir; what I put down there is correct, as far as I can

198 say. The condition of the ceiling and plank was sound at the break. The break extended aft from the main rigging about 8 feet

Q. How far was it from the main rigging to the stern?
A. I can't tell directly; as near as I can tell, it was about 27 feet. I was subpœnaed by letter from Mr. Fox to come on to New York. I did not know the party from whom I received the letter. They said they wanted me about the Mary C. Town. I got that letter on Sunday last. I left Baltimore last night. That was not my only business on here altogether. I came here on private business not connected with this case.

BASIL S. WELLENER.

Subscribed and sworn to before me this 12th day of December, A. D. 1865.

JOHN A. OSBORNE,
U. S. Commissioner.

199 Q. You were asked the rate of the tide there; you mean at this time where you were, it was 2½ knots?
A. Yes, sir, at that time; there is a difference, of course, in the strength of the tide.
Libellants rests.

Defence.

Elisha H. Daggett, a witness for respondents, being duly sworn, testified:

Examined by Mr. Donohue:

Q. What is your business?
A. Seaman, sir.
Q. Have been so how long?
A. 24 years.
Q. In what capacity?
A. In all capacities, from a cook to a captain.
Q. What is your present employment?
A. First officer of steamship Missouri.
Q. In what line?
A. E. R. Garrison's line—Star line.
Q. That is the New York Mail Steamship Company?
A. Yes, sir.
Q. Are you or not familiar with the subject of whistles?
A. Yes, sir.
Q. Do you know of any custom whatever that authorizes you to whistle to a sailing vessel you are about to meet, to change her course?
200 A. I do not, sir.
Q. Would you consider a whistle to change her course good seamanship? Meeting a sailing vessel, would you consider it good seamanship to direct her to change her course, you being in a steamer?
A. No, sir; I should not.
Q. Where you use the steamer's whistle to go to the right or left, what are they?
A. Meeting steamers, one to go to the right, two or left.
Q. Is that a long or short whistle?
A. A short puff of the whistle.
Q. What does a long blast denote?
A. It denotes a mere warning that you are coming, or that you see them.

Cross-examined by Mr. McMahon:

Q. Have you sailed in coasting vessels?

A. Yes, sir; I have.

A. Under canvass?

Q. Yes, sir; have been from a fifty-ton boat to a 2,000-ton ship.

Q. Have you been on the Potomac River?

A. No, sir; never was there in my life.

Q. Have you never blown a whistle to a vessel when you have been in a tight spot with her to change her course?

A. Never to change her course. I merely blew to let him know I saw him.

Q. (Court.) I understand you that when you blew one whistle,
201 short blast, that is a notice to the vessel that you are going to the right?

A. (Libellants.) That is steamers—that you port your helm, and go to the right.

Q. That is a notice that the steamer will do that?

A. That the ship will do so.

Q. That both vessels should port?

A. Yes, sir.

(Respondent.) Q. That is in meeting steamers?

A. Yes, sir.

Q. (Libellants.) How long has that rule been in existence for steam-vessels?

A. I think within the last four or five years.

Q. (Court.) When you meet a sailing vessel?

A. I don't say sailing vessels; I say steamers.

Q. (Libellant.) When you meet a sailing vessel and give a short blast of the whistle, what do you mean by that?

A. We don't mean anything; we never use that as a signal.

Q. You never blow whistles to sailing vessels?

A. No, sir; unless a long blast to let them know we see them.

Q. Is it customary for steamers to blow whistles to sailing vessels?

A. No, sir; they are not supposed to know anything about it.

Q. If I understand you right, within the last four or five years your navigation has been confined to the ocean?

A. Ocean and sound; principally ocean steamers.

Q. From here to what ports?

202 A. From here to Boston and further east; and from here to Savannah and New Orleans and Galveston.

Q. Not up the rivers?

A. No, sir.

Re-direct examination:

Q. Is it not customary to give the long whistle of notice to all vessels?

A. It is a custom, if you don't think they see you, just for your own convenience, to let them know you see them, and are looking out for them.

Thomas S. Ellis, a witness for respondents, being duly sworn, testified:

Examined by Mr. Donohue:

Q. What is your business?

A. A ship-master, sir.

Q. Have been so how long?
A. 18 years.
Q. What is your present employment?
A. My present employment, port captain of the Continental line.
Q. In going to sea, do you know of any customs among steamers to give any blast of the whistle at all to sailing vessels to get out of the way, or to change their course?
A. No, sir.
Q. Would it be, in your judgement, good seamanship, under any rule that you know of, for a steamer to whistle to a sailing vessel to
203 change her course?
A. No, sir; it would not.
Q. The signals to go to the right and left are between steamers?
A. Yes, sir.
Q. What are they?
A. One to port and two to starboard.
Q. Is that a long or short blast?
A. A short blast.
Q. What does a long whistle mean?
A. If I saw a vessel ahead, and thought I should approach her very near, I would give a long blast, and warn her I saw her.
Q. Is or is not that done?
A. It is done frequently where the vessel is ahead.

Cross-examined by Mr. McMahon:

Q. Have you within the last five years navigated on the Potomac River?
A. I have, sir.
Q. How much of the time?
A. Well, four or five times I have been up and down there.
Q. In command of vessels?
A. Yes, sir; of a steamer at that time.
Q. What steamers?
A. The steamer Lucy.
Q. When were these four or five times you were up there?
A. It was a year last April, I think, or March.
Q. April or March, 1865.
A. Yes, sir.
204 Q. Before that time had you been in command of any vessel on the Potomac?
A. Sailing vessels, I had.
Q. When?
A. It was about eight years ago, as near as I can recollect.
Q. I said within the last five years.
A. Not within the last five years.
Q. Then your experience within the last five years is confined to these four or five trips in command of this steamer Lucy on the Potomac River?
A. Yes, sir.
Q. What vessel have you been in command of on other waters during the last five years?
A. I have had five steamers during the last five years.
Q. Where?
A. Running from here to Havama, and from New Orleans to Mexico, and one trip from here to Europe.
Q. Then your experience is on the ocean?

A. Yes, sir; and coasting.

David Y. Glover, called for the respondents, being duly sworn, testified:

Examined by Mr. Donohue:

Q. What is your business?

A. Pilot, by way of Hell Gate.

Q. For how long?

Since May, 1836.

205 Q. How many coasters do you suppose go up and down through the passages of the sound during the day?

A. A very large number; a great many.

Q. Do you know of any custom by which a steamer can, by a whistle or signal of any kind, ask a sailing vessel to change her course?

A. I do not.

Q. Would you consider it good seamanship in a steamer to whistle to a schooner or sailing vessel to change her course?

A. No, sir; unless it was in some very tight place.

Q. Would you consider then that they had any right to do it, under any rule or custom?

A. No, sir; I consider it a duty incumbent on myself to pay no attention to the steamer, but understand it to be the duty of the steamer to turn out of the way. But, to avoid a collission, if I saw a steamer coming, I should continue my course as bold as a lion until I saw which way the steamer was going to steer, and then I would sheer the reverse.

Q. Do you know of any such custom, anywhere, for a steam-vessel to whistle to a sailing vessel to change her course?

A. No, sir.

Q. What do you understand a long whistle to be?

A. A caution, which is used one hundred times a day in the Atlantic Dock; a steamer, lying back, cannot see distinctly outside, and

206 blows a long, steady blast of the whistle.

Q. Are you familiar with the signal given to other steam-vessels to turn to the right or left?

A. I am; it is a short blast; one or two.

Q. Then when you hear a long whistle, what does it indicate?

A. It indicates caution.

Cross-examined:

Q. Did you ever have any experience on the Potomac River?

A. I never navigated that river but once; I went up with the Jacob Bell to deliver her to the government.

Q. If I understand you right, there was no custom by which a steamer should whistle to a sailing vessel at all?

A. A sailing vessel is not in duty bound to notice it at all.

Q. That is as you understand it?

A. Yes, sir.

Q. That a sailing vessel is not bound to notice a signal from a steamer?

A. No, sir.

Q. A sailing vessel is bound to keep her course?

A. That is her duty.

Q. Do yoou understand the rule to be that she is bound to keep on her course and run into a steamer?

A. I understand that the moment a sailing vessel alters her course, that gives the steamer the chance to say, "It was your fault; if

207 you had kept your course we would have avoided you."

Q. I ask you if you understand the rule to be that a sailing vessel is to keep on her course, even if she runs into a steamer?

A. No, sir; but to keep her course until the last extremity—until she sees how the steamer is going to steer, then she can sheer.

Q. In the last extremity it is her duty to shear?

A. If you see a steamer sheer one way, you, of course, sheer the reverse, to avoid a collission.

Q. You understand that the sailing vessel must keep on her course until there is danger of collission?

A. I should not attempt to alter my course.

Re-direct:

Q. Is it or not customary for a steamer in that way to blow one long whistle or caution?

A. Yes, sir; when they see any obstructions ahead they notify them by giving a long blast of the whistle; the same as when they are leaving the dock or entering Atlantic Basin.

James Byrne, called by the respondents, being duly sworn, testified:

Q. What is your business?

A. Engineer.

Q. And have been how long?

A. About 18 years, off and on.

Q. Were you on the "Metropolis" at the time of this collission?

A. Yes, sir.

Q. In what capacity?

A. Second assistant.

208 Q. Who was in charge of the engine?

A. I was.

Q. Did you or not feel the jar of the collission?

A. I did, sir; slightly.

Q. At the time of that jar was your engine working ahead or astern?

A. Backing.

Q. About how long had you been backing?

A. I should judge three or four revolutions.

Q. How did you come to back it?

A. By getting the bells.

Q. What were the bells?

A. I had one to stop, and two to back.

Q. Prior to the bell to stop, had the vessel been running fast or slow?

A. Slow, sir.

Q. In consequence of what did you slow?

A. I had a bell to slow her.

Q. How long had you been running slow?

A. I should judge ¾ of an hour.

Q. Did you or not know the reason of it?

A. I heard we were looking for anchors; that is all; we are not supposed to know anything on deck much.

Cross-examined:

Q. You got a bell to stop?

A. Yes, sir.

Q. How long an interval between that and the next two?

A. Right away.

Q. All three right together?

209 A. Right after one another.

Q. That you call ringing sharply?
A. Yes, sir; in quick time.
Q. Then you got your engine reversed?
A. Yes, sir.
Q. How long did it take you to do that?
A. A very short time.
Q. How long?
A. Not over two or three seconds, I suppose, with that engine.
Q. How long do you think it took to ring those bells?
A. I cannot tell.
Q. A second for each bell?
A. They were very close together.
Q. Three seconds for three bells?
A. I cannot say exactly.
Q. How long did it take to make your three revolutions back?
A. I think it might have been a little over a minuite or two.
Q. A minuite or two to get three revolutions back?
A. Yes, sir.
Q. And while going through the third revolution you heard the jar?
A. Between the 3rd and 4th.
Q. Where was your engine situated?
A. It was as near midships as possible; I never measured it.
Q. How many decks has your vessel?
A. Three, I think.
210 Q. Which deck were you on?
A. We were on the main deck.
Q. You had a jar there, you say; just tell me which way you were thrown?
A. I was not thrown; it was a slight jar.
Q. A slight jar?
A. Yes, sir; very slight; such as we would feel when we come up against a dock.
Q. How much time does it take to stop the way of your vessels through the water?
A. That is according to the speed; the way we were going then, so slow, I think three revolutions would stop her right still.
Q. Stop the engines?
A. No; stop the speed of the vessel; three or four revolutions would stop the way of the vessel; three ought to stop her then.
Q. How fast were you going before these bells were rung to stop?
A. We could not have been going over three or four knots, I think.
Q. How many revolutions was the wheel making?
A. I judge between four and five.
Q. To the minuite?
A. Yes, sir.
Q. Was it a side-wheel steamer?
A. Yes, sir.
Q. And what is the diameter of your wheel?
A. 38 feet, or under; I never measured it.
Q. Before you commenced to slow on that night, how fast had
211 you been going?
A. We stopped three or four times previous to that; I would get a bell to hook her on, and then to go again, and then stop again; we did not get under much headway.
Q. What is the utmost speed of your vessel?
A. Twelve knots.

Henry Walcott, called by the respondents, being duly sworn, testified:

Examined by Mr. Donohue:

Q. What is your business?
A. Engineer.
Q. And have been how long?
A. Four to five years.
Q. Were you on board the "Western Metropolis" at the time of collission?
A. Yes, sir.
Q. In what capacity?
A. Third assistant engineer.
Q. Where were you at the time of the collission?
A. In the engine-room.
Q. Did you feel the jar of the vessel?
A. Yes, sir.
Q. At the time of the collission, how were your wheels turning, back or ahead?
A. I think she was stopped.
Q. Were the wheels backing or going ahead?
A. That I cannot say.
Q. Did you hear the bells rung?
A. Yes, sir.
212 Q. What were they?
A. One to slow & one to back.
Q. What had been the headway before getting these bells? How had you been running?
A. Slowed down.
Q. Did you know for what purpose?
A. No, sir.

Counsel for respondents reads in evidence the deposition of Thomas Wood, Joseph A. Jackson, Charles W. Adams, and William Kain.

On the cross-examination of Charles W. Adams, counsel for respondent objected to all the testimony of the witness in reference to the sinking of a schooner on the Naugatuck shore, which was excluded by the court; to which counsel for the libellants excepted, claiming the right to introduce it as evidence, although somewhat remote, on the subject of the recklessness of witness.

George F. Cowen, called by the respondents, sworn:

Examined by Mr. Donohue:

Q. What is your business?
A. Seaman.
213 Q. And have been how long?
A. 18 years.
Q. In what capacity?
A. Seaman, fourth mate, third mate, second mate, and mate.
Q. Were you on board of the Western Metropolis at the time of the collission?
A. I was.
Q. In what capacity?
A. Second mate.
Q. Where where you at the time of the collission?
A. On the forecastle?
Q. How long had you been there?

A. Probably five minuites.
Q. How long before the collission did you see the schooner?
A. About five minuites.
Q. How was your vessel heading at the time you saw the schooner, as regards the river?
A. Heading up the river.
Q. How was the schooner heading?
A. Down the river.
Q. Did you know the compass bearings there at all?
A. No, sir; I have no recollection of the compass bearings.
Q. Which bow did the schooner bear off from you?
A. On the starboard bow.
Q. About how far off?
A. Between two and three points.
Q. If that course had continued of both vessels, would there
214 have been any collission?
A. No, sir.
Q. What was the first thing you saw?
A. The first thing I saw was the schooner change her course and attempt to cross our bow.
Q. Putting her helm bow?
A. She put her helm aport and crossed our bow.
Q. When she ported that way, what was done on board your vessel?
A. The bells were rung to stop and back.
Q. Could anything else have been done on board the steamer than was done?
A. Nothing that I am aware of.
Q. Did you give any order about porting or starboarding the helm?
A. No, sir.

Cross-examined:

Q. You say you saw the schooner five minuites before the collission?
A. Yes, sir.
Q. What were you doing at the time?
A. Doing nothing; I went up on the forecastle to look at the vessel.
Q. What made you go up there?
A. Hearing the man on the look-out report a sail.
Q. Had the whistle been blown at that time?
A. I am not certain whether any whistle had been blown.
Q. Are you sure that any whistle was blown at any time?
A. No, sir.
Q. You do not recollect any whistle?
215 A. No, sir.
Q. About how far off was the schooner at the time you first saw her?
A. Probably a quarter of a mile.
Q. About how far off were you when you observed her go across your bows?
A. She was very close when I observed her go across our bows.
Q. About how far off?
A. As near as I can judge, she was not more than the length of our ship—250 or 300 feet—when she altered her course.
Q. You did not hear the first mate cry out "hard aport" to the pilot?
A. No, sir.
Q. You heard nobody cry out "hard astarboard?"
A. No, sir.

Q. You heard no whistle?
A. There might have been a whistle, but I have no recollection about it.
Q. About how far off was the schooner from you when she commenced to put her helm aport?
A. I judge somewhere between 250 and 300 feet.
Q. How fast was your vessel going then?
A. She was going very slowly; probably three knots.

Re-direct:

Q. Do you know any custon or usage by which any whistle can be given by a steamer to a sailing vessel to change her course?
A. None, sir.

216 William B. Hilton, called by the respondents, sworn:

Examined by Mr. Donohue:

Q. What is your business?
A. Seaman.
Q. How long have you been to sea?
A. Since 1839.
Q. In what capacity?
A. In all capacities, from before the mast to a captain.
Q. How long have you been master?
A. Since 1845.
Q. In what capacity were you on board the Western Metropolis?
A. As master of her.
Q. Where were you at the time this vessel was reported?
A. I was in the pilot-house.
Q. And how long had you been there?
A. I had been there somewhere about two hours.
Q. Detail slowly, from the time the light was reported, what occurred.
A. I was in the pilot-house when a sail was reported by a man at the look-out.
Q. That was this sail?
A. Yes, sir; this sail was reported. I asked, "Where away?" The reply was, "On the starboard bow." I took the night-glass and looked at her; she was then bearing about three points off the starboard bow.

217 We were heading up the river, northwest. The schooner was heading, as near as I could judge, S. E. by E., or thereabouts; she might have been a mile or a little more distant. I observed she began to yaw about, steering wild. I blew one long blast of the whistle. The schooner was changing her course to the westward on her port helm. We at that time were moving about 4 miles per hour, as slow as we could go, with the view of anchoring the ship for the night. The schooner changed her course some eight points, more or less.

Q. That is, up to the time of the collission?
A. Yes, sir; up to the time of the collission she changed her course eight points.
Q. You say you blew one long blast of the whistle?
A. Yes; one blast of the whistle.
Q. Why was that?
A. Simply as a warning that we saw her.
Q. Do you know any custom or usage by which a steam-vessel gives a whistle to a sailing vessel to change her course?
A. No, never.

Q. From your experience as a seaman, would that be good judgement or seamanship from a steamer to do so?

A. It would not.

Q. When blasts are given for a change of course, from one steamer to another, how are they—long or short?

A. One short blast to port the helm; two short blasts to starboard.

Q. What does the long blast indicate?

218 A. A warning or signal.

Q. For what?

A. To call attention, as often times vessels have no look-out; this vessel, I omitted to state, had no light set; that I can swear positively; and they very often keep no look-out; I have been always in the habit of blowing a long whistle when approaching a sailing vessel, to call attention that we see her.

Q. Is that customary?

A. It is customary on all ships where there are any regulations.

Q. When this vessel kept away, could you have done anything more than you did to avoid the collission?

A. We could do nothing more than stop the engine and back her.

Q. Did you do that?

A. Yes; I rang the bells myself; one to stop and two to back; hove the helnn hard to starboard; and at the time of the collission she was dead in the water.

Q. How much did your vessel change her course on starboarding your helm, at the speed she was going at?

A. About half a point.

Q. With your vessel going at the speed she was going at, putting the helm hard aport, how far would she have run to make a point off her course?

219 A. At the speed we were going at, it would have taken some time.

Q. How long would it take to change her course a point?

A. It would have taken probably twenty minuites.

Q. How long a distance would she have run going at that speed?

A. We might have gone a quarter of a mile.

Q. To have broken the sheer, or made one point in the opposite or starboard sheer, how long would it take, going at that speed, with your vessel?

A. It would have taken more than double that time.

Q. Was your helm put aport after seeing that schooner?

A. It was not.

Q. Did your mate, or any other person, sing out to put aport?

A. I swear positively they did not.

Q. Were the bells to stop and back the engine answered before you came together?

A. Yes, sir.

Q. After the vessel ported her helm, could you, by porting your helm, have cleared her?

A. We could not.

Cross-examined:

Q How far off was the schooner when you first saw her?

A. That was all a matter of guess-work at night.

Q. Give us your guess.

220 A. A mile, more or less; it is all guess-work about distances in the night.

Q. And how long a time was it you had her in view up to the collission?

A. That is a mere matter of guess-work; I do not know what time by the clock.

Q. Can you give any idea?

A. No; I have no idea about it.

Q. A long or short time?

A. Not a great while.

Q. You heard what Mr. Cowen says: five minuites?

A. He only stated what he saw.

Q. Was it five minuites from the time you first saw her till the collission?

A. I cannot say; I would not be willing to swear to any time.

Q. Except it was short?

A. A short time.

Q. About how far off could you see a vessel that night?

A. A vessel without a light, about a mile; a vessel with a light, three or four miles, according to the kind of light it was.

Q. Was it starlight?

A. It was cloudy—dark.

Q. Any moon?

A. No moon.

Q. How far was the vessel off when she took a change of course across your bows?

A. I cannot state distances.

Q. How many lengths of your vessel do you suppose?

221 A. I cannot tell you; it would be a matter of guess-work about distances in the night.

Q. You cannot give any idea?

A. Not the slightest.

Q. Was she near at hand?

A. She was not a great ways off.

Q. Can you give us how far in time she was off?

A. No, sir.

Q. Except it was a short time?

A. Yes, sir; it was a short time.

Q. Before you saw her, you say she was three points on your starboard bow?

A. Or thereabouts; about three points; I did not take the compass to see; she was heading more down on the Maryland shore than down the river; the wind was nearly after her.

Q. How were you heading?

A. About northwest on the Virginia shore, or nearer the Virginia shore.

Q. Do I understand you to say you starboarded your helm after you saw her or before?

A. I starboarded the helm when I rang the bells to back the steamer.

Q. How had it been before that?

A. Amidships.

Q. Did you at any time, after seeing the vessel, put your helm aport?

A. We did not.

Q. Did you at any time, after seeing her and before you blew

222 your whistle, put your helm astarboard?

A. We put the helm astarboard when we rang the bells to go back.

Q. Before that, and after you saw her, did you put the helm astarboard?

A. We did not; there was a wide berth between us.

Q. What movements of your helm did you make between the time of first seeing her and the time you came together?

A. None whatever, until we starboarded and rang the bells to go back.

Q. There was no necessity for having any change of your helm between these times?

A. Not the slightest.

Q. Why?

A. We never alter our course; vessels going opposite ways, one, two, or three points on each bow, if both go about their business there will be no collission.

Q. There was no necessity for changing the helm at all?

A. No, sir; when they were so wide apart; had we met them head and head, it would have been the duty of both vessels to have ported.

Q. When you meet a sailing vessel, too?

A. Yes, sir.

Q. That is, as you understand the rule?

A. Yes, sir; as I understand it.

Q. You took charge of the helm that night?

A. I had charge of it all day.

223 Q. You had charge of the vessel, but you had a pilot in the pilot-house?

A. Yes, sir; I was acting under his orders.

Q. Did you take the helm out of his hands?

A. He did not have it; he did not know how to steer.

Q. Did not know how to steer?

A. No, sir.

Q. Yet he was a pilot?

A. Yes, sir.

Q. Did you not give directions without reference to him?

A. I obeyed his orders.

Q. Did you obey his orders when you blew the whistle?

A. I did.

Q. He told you to blow the whistle?

A. Yes; to give him one long blast.

Q. Did you notice any decided change in the course of the schooner before this putting of her helm hard aport?

A. Yes, sir.

Q. What were the changes before she put her helm hard aport?

A. As stated to you, she was steering very wild.

Q. Give us a little explanation of that.

A. All schooners runing before the wind in a strong breeze, the wind dead aft, it is almost impossible to steer her; the whole power is applied on one side of the vessel only. All schooners ruming before the wind steer very wild; the whole propelling power is on one side of the vessel, which causes her to yaw.

224 Q. And that is what you mean this night?

A. That is what I mean.

Q. Then you saw nothing out of the usual course of schooners, under such circumstances?

A. Nothing, until she changes her course.

Q. Yet I understand you to say that, notwithstanding that yaw, she would have passed you how far off on your starboard?

A. I cannot say how far; it is a matter of guess-work.

Q. About how far?

A. A respectable distance.
Q. Give us as near as you can.
A. A respectable distance.
Q. Notwithstanding the yaw?
A. If she had kept her course, she would have gone with perfect safety a respectable distance.
Q. That is, up to the time she went across your bows; up to the change of her course?
A. She changed her course previous.
Q. What other change of course was there outside of the usual course of navigation of schooners before the wind that might than the change across your bows; that is, after you first saw her?
A. She was steering directly down the river, as near as she could.
Q. Did you observe any other change of course on the part of the vessel that night, besides her ruming across your bows, than the usual yaw that is concomitant to a schooner sailing before the wind?
225 A. Nothing more than you usually see.
Q. I would like to know why you blew your whistle?
A. To let him know we saw him.
Q. That is all you blew your whistle for?
Yes, sir.
Did he cross your bows before your whistle was blown, or afterwards?
A. He was heading about two or three points to the south; his course, when the whistle blew, was S. S. E.; when first seen, it was S. E. by E.
Q. Why did you not tell that before? I asked you about this change of course. I was particular in asking you if there was any other change of course up to the time of ruming across your bows, and I understood you to say none but such as was concomitant to a schooner's steering before the wind?
A. That is so.
Q. If there was any other change, let me know.
A. There was no other.
Q. What did you blow your whistle for?
A. As a warning to him not to run into us.

Re-direct:

Q. A sailing vessel meeting a steamer, is there any such thing as a steamer whistling to a sailing vessel to port her helm?
A. There is not.
Q. Nor is there any such duty incumbent upon the schooner to port her helm?
A. No, sir. I would further remark, that in many years' expe-
226 rience in the English and Irish Channels, where we meet twenty steamers to the one we meet in the Sound, we always kept our course, under all circumstances; a sailing vessel, under every circumstance, in meeting a steamer, kept her course.

Re-cross:

Q. Did you, before this trip, sail on the Potomac River?
A. Yes, sir.
Q. How long?
A. I was there in 1849.
Q. Were you since 1861?
A. Not since 1861.
Q. Since 1861, up to Febuary, 1866, on this occasion, you had not sailed on the Potomac?

A. I had not?
Q. Was this your first trip upon the Potomac since the war?
A. It was.
Q. You are not in command of a vessel now?
A. Not at this moment; have not been since Dec. 15th, 1865.

Re-direct:

This vessel was sold to N. American Lloyds, and made no voyage since I left her.
Respondent rests.

John T. Fox recalled by libellants:

Examined by Mr. McMahon:

Q. Did you at any time, from the time you first saw the steamer until the whistle was blown, sheer on her starboard bow?
227 (Objected to as not new matter. Excluded.)
Q. You have heard the statement of the captain of the steamship with reference to the movements of your vessel, or changes of her course before you ported. What have you to say as to that—as to the schooner yawing?
(Objected to. Admitted.)
A. I contradict it; she did not yaw; she sailed light, and we could steer her very good; could steer her as straight as you could a steamer at that time; that is all I have to say.
Q. Did your boom jibe?
A. No, sir.
Q. Explain, if you please, how your boom could not jibe?
A. We had the wind about N. by W. at that time; the wind was on our port side, a little aft of our beam, and our sheet about half up. To jibe the main boom the vessel would have to keep off, and get the wind on the starboard side, and be across in this way—(illustrating)—but she did not.
Q. You swear that she did not jibe her main boom that night?
A. I do.

Cross-examined:

Q. The demonstration you made with the models is on the supposition that you had the wind abeam?
A. Yes, sir; a little aft the beam.
228 Q. How much abaft?
A. N. by W.
Q. How much abaft, in order to get across the river in that way?
A. I suppose about two points abaft the beam, or three points.
Q. Did you have the wind at that time three points abaft your beam?
Two or three points.
That is your recollection?
Yes, sir; we had our sheet about half up.
Is your recollection more distinct than it was when you swore to the libel?
A. No, sir.
Q. Do you mean to say that a fore-and-aft vessel, light, with the wind two or three points abaft the beam, can be kept on her direct course and not yow?
A. She will yaw very little; say $\frac{1}{4}$ of a point in smooth water.
Was this very smooth water?

Yes, sir.

Suppose the wind was further aft, what effect would that have?

Not any, with that breeze of wind.

Q. So that if the wind was almost directly aft, you could keep the vessel steady on her course, with the variation of a quarter of a point either way?

A. Yes, sir; if the vessel was deeply loaded, I could not.

229 Testimony closed.

Adjourned.

The following are the depositions on the part of the claimants:

230 (Indorsed:) U. S. district court S. D. of New York. Benjamin F. Town et al., libellants, vs. the steamship Western Metropolis, respondents. Copy libellant stenographer's notes.

231 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this thirteenth day of March, in the year of our Lord one thousand eight hundred and sixty-six, I, John A. Osborn, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office, at the United States court building, 39 and 41 Chambers street, in the city of New York, in the southern district of New York, in the State aforesaid, Thomas Wood, to testify and the truth to say on the part and behalf of the claimants, in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the , at New York City, in the district aforesaid, wherein Benjamin F. Town et al libellants, against the steamship Western Metropolis, her tackle, &c., respondents.

And the said Thomas Woods being about the age of twenty-six years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Thomas Wood, and he did thereupon depose, testify, and say as follows, viz:

I was on board of the Western Metropolis at the time of the collission; had been aboard three months and half. At the time of collission I was on the top-gallant forecastle—on the look-out; had been on the look-out for twenty minuites. I first saw the schooner on the starboard bow about 2 points. I saw no light on her.

Q. If both vessels had kept on the course they were on when you first saw the schooner, would there have been any collission?

A. No, sir; there would not. The schooner would have gone on the starboard side of us. At the time of the collission our engine was backing. I heard the whistle blown. I have been in steamers, off and on, about 18 months.

232 Q. When a steamer meets a sailing vessel in that way, and blows her whistle, what is it understood to mean?

A. For the sailing vessel to keep on her course. After I first saw the schooner she changed her course before the collission. Her change was her helm to port. The persons on our vessel could have done no more than we did do to avoid the collission. I saw the man that came on board of our vessel from the schooner.

Q. Did you hear him state anything in regard to what produced the collission?

(Objected to on the grounds that his declarations are not evidence against us; 2nd. that that man's attention, when examined, was not called to this enquiry.)

A. I did, sir.

Q. What was it?

(Same objection as before.)

A. The man said that if the captain of the schooner had not acted as foolish as he did, the collission would not have happened. He said the captain came out of the cabin excited, and gave the order to port the helm.

Cross-examined by Mr. McMahon:

Q. You state that your vessel did all that lay in their power to avoid the collission; let us know what they did.

A. They reversed the engine.

Q. Is that all?

A. That's all.

233 Q. How long had you that schooner in sight before the collission?

A. About 15 minuites.

Q. About how far off was she at the time you first saw her?

A. I don't know. I can't judge a vessel's distance in the night-time.

Q. How many minuites' time elapsed between your first seeing her and the collission?

A. Fifteen minuites.

Q. About how fast was the schooner going?

A. About eight knots.

Q. How fast was your vessel going when you first saw her?

A. About 5½ knots.

Q. Did you do anything when you first saw the schooner?

A. I did, sir; I reported her.

Q. In what way?

A. A sail about two points on the starboard bow.

Q. Did you report her more than once?

A. No, sir.

Q. Was any response made by the pilot, or those in the wheel-house, to your report?

A. I was answered from the wheel-house.

Q. What was the answer?

A. "All right."

Q. How long before she struck was the whistle blown?

A. About 12 minuites.

234 Q. Had you been looking at the schooner up to the time the whistle was blown?

A. I had, sir.

Q. Do you know of your own knowledge for what purpose the whistle was blown?

A. To let her know that we saw her, and that it was all right, and to keep on her course.

Q. Had there been any alteration of course on the part of your vessel before the whistle had blown?

A. Had not, sir.

Q. How do you know that?

A. The way the schooner bore.

Q. Is that all the way you know it?

A. That is all.

Q. Had there been any alteration of course on the part of schooner before the whistle was blown?

A. I don't know. I couldn't tell—rather too far off.

Q. How far off was the schooner when you first observed her changing her course?

A. I can't tell, sir.

Q. How many minuites time before the collission was it that you first observed her change of course?

A. I don't know, sir.

Q. You were looking at the schooner all the while, were you not?

A. Yes, sir.

Q. Did you keep your eyes on her until the two vessels came together?

235 A. I did, sir.

Q. How long had you been on the top-gallant forecastle deck before you saw the schooner?

A. 5 minuites.

Q. Were you stationed there as a look-out?

A. Yes, sir.

Q. Who by?

A. By the mate of the steamer.

Q. Did you not run upon the forecastle deck at or just before the schooner was reported?

A. No, sir; I was already up there.

Q. Did you see the first mate up there?

A. I did, sir.

Q. Did you see him run up there?

A. I did not see him run up there; he was up along side of me all the time.

Q. Was he along side of you when you reported the schooner?

A. Not very close—a little distance off.

Q. Was he on top-gallant forecastle deck when you reported her?

A. He was, sir.

Q. Did you see him come out of the mess-room before the collission?

A. No, sir.

Q. Did he not come out of the mess-room before the collission?

A. Not to my knowledge.

Q. Did you hear him report the schooner?

A. I did, sir; he reported the same as I did.

Q. Where did the two vessels come together?

236 A. We watched the vessel just forward the main rigging. She came across our stern.

Q. Did you touch any other part of the schooner?

A. We did not, sir.

Q. Did the schooner sink at once?

A. Not as long as I could see.

Q. How long were you looking at her at and after the collission?

A. About 10 minuites.
Q. Did you injure her side at all?
A. Not that I know of; it was dark, and I could not see.
Q. On which side of the schooner did you strike?
A. On the port side.
Q. Did you hear the 2nd mate cry out to port to your pilot?
A. Not to my knowledge.
Q. Did you hear anybody do so?
A. No, sir.
Q. Did you hear anybody do so to any one in your pilot-house before the collission?
A. I did not, sir.
Q. Did you hear the first mate cry out to "starboard" to any one in your pilot-house?
A. No, sir.
Q. Did you hear the captain do so?
A. No, sir.
Q. Did you hear any one do so?
A. I did not.
Q. Did you hear any of the orders given in the pilot-house?
237 A. The pilot-house was too far off to hear.
Q. Just before the collission, was there much uproar on board your vessel?
A. I didn't hear any.
Q. Was there any confusion?
A. None that I know of, sir.
Q. Were there men running out on the forward and on the top-gallant forecastle deck before the collission?
A. I don't know; did not pay any attention; my attention was drawn to the schooner.
Q. How do you know that your engine was reversed before the collission?
A. I heard the bells strike.
Q. What bells?
A. Engine-room bells.
Q. How many?
A. Three, sir.
Q. No more?
A. No, sir.
Q. How long was that before the collission?
A. I don't know; can't tell.
Q. How far was the schooner off when you heard the bells?
A. I could not judge, sir; she was quite a distance off?
Q. How many the lengths of your vessel off?
A. That is more than I can tell.
Q. Have you no idea of the distance she was off?
A. Have no idea.
238 Q. Did you keep on making reports about the schooner after you first reported?
A. I made but one report.
Q. What course was the schooner when you first saw her?
A. Don't know what course she was. She was going directly the opposite way from us.
Q. What course were you on when you first saw her?
A. I was nowhere near the compass.
Q. Were you present here when the first mate was examined?

A. Yes, sir.
Q. Did you hear all his testimony?
A. I did not.
Q. How soon after the whistle was blown was it that you observed a change of course on the part of the schooner?
A. I can't tell; I am a poor judge.
Q. How long was it before the collission that you observed distinctly a change of course on the part of the schooner?
A. I think about three minuites.
Q. Was that before you heard the engine bells or after?
A. Just before, sir.
Q. How much before?
A. About a second.
Q. When you observed the change of course on the part of the schooner, what was it by the compass?
A. I didn't see the compass.
Q. What was the course?
239 A. I don't know?
Q. At that time, what was the course of your steamer?
A. I don't know.
Q. In this conversation, you had with a man on board from the schooner after the collission, did you state all that occurred?
A. Yes, sir.
Q. Who was he talking to?
A. Some of the crew.
Q. Did you hear all that he said?
A. I did, sir.
Q. Did you hear what the crew said to him about the collission?
A. I did not; I don't know that they said anything.
Q. Did your vessel render any assistance to the schooner that night after the collission?
A. We did not. We asked them to come aboard, and they refused.
Q. Why did you ask them to come aboard? Were they in such a state of necessity as to leave their vessel?
A. I don't know.
Q. Were you on the steamer after the collission?
A. Yes, sir.
Q. How long a time?
A. Very near three months.
Q. Do you recollect her running down a vessel off Nantucket Shoals?
240 (Objected to on the ground that it is not material. The commissioner sustains the objection of the counsel. The counsel for libellant insists on the question being answered. The commissioner instructs the witness not to answer. To which the counsel for libellants excepts.)
Q. Where have you been staying for the last three months?
A. Part of the time aboard the Western Metropolis and the steamer "Lucy."
Q. Have you been supported during that time by the owners of the "Western Metropolis?"
A. I have been employed by them as ship-keeper.

Re-direct:
Q. Did or not the schooner jibe before the collission?
A. She did, sir.

Re-cross:

Q. Did she strike on her main boom?
A. She did not, sir.
Q. Did she break her main boom?
A. Not that I know of.
Q. Did she tear her mainsail?
A. Not that I know of.
Q. How far off was she when you observed her boom jibed?
A. I don't know, sir, exactly.
Q. About how far off?
A. I can't judge how far she was.
Q. About how long before the collission?
A. About three minuites.

241 Q. Could you have chucked a biscuit on board when you observed distinctly her main boom jibing?
A. No, sir; I could not; a piece of lead I might.
Q. How far can you throw a piece of lead? Half a mile?
A. I don't know exactly; never measured the ground.
Q. Can you throw a piece of lead $\frac{1}{4}$ of a mile?
A. Don't know, sir.
Q. Can you throw a piece of lead an $\frac{1}{8}$ of a mile?
A. Don't know, sir.
Q. How large a piece of lead could you have thrown that night on the schooner when she jibed?
A. That I can't tell.
Q. How was the wind that night?
A. Right down the river.
Q. Can't you give us the direction of the wind any more near?
A. I am no pilot on the Potomac, and don't know the courses of the river.
Q. When you first saw the schooner, which of her bows did you see first?
A. If I could see her plain, I could see her port bow first—starboard bow, I mean.
Q. Were you able when you first saw her to see distinctly either of her bows, and which one?
A. Not when I first saw her?
Q. Were you able before the whistle was blown to see either of her bows; and, if so, which one?
A. I could see her starboard bow and her starboard side after the whistle was blown.

242 Q. Question repeated.
A. No, sir.
Q. On which side of her did her main boom swing when the whistle was blown?
A. On the starboard side when the whistle blowed.

THOMAS WOOD.

Subscribed and sworn to before me this 13th day of March, 1866.

JOHN A. OSBORNE,
U. S. Commissioner.

243 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this tenth day of March, in the year of our

Lord one thousand eight hundred and sixty-six, I, John A. Osborn, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Joseph A. Jackson, to testify and the truth to say on the part and behalf of the claimants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York City, in the district aforesaid, wherein Benjamin F. Town et al., libellants, against the steamship Western Metropolis, her tackle, &c., claimants and respondents. And the said Joseph A. Jackson being about the age of thirty-five years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Joseph A. Jackson, and he did thereupon depose, testify, and say as follows, viz:

I was aboard of the "Western Metropolis" at the time of the collision with schooner "Mary C. Town," as quartermaster. I was not on duty at time of collision. I saw the schooner before the collision. When I first saw her I was standing by the corner of the house on the port side forward. 3. The schooner bore from us a point and a half to two points on our starboard bow. I saw no light on her. If the vessels had continued on the courses they were then on, I think there would have been no collision. The schooner would have gone on the starboard side of us at least a quarter of a mile. I did not continue at the place I was standing up to the time of collision. I stepped back to the room
244 door; something called my attention there. The room was forward of the shaft. 4. The next thing I heard was the engine-bells ringing. I ran forward again to the same place I was before. The schooner then was tacking to come across our bows. Our vessel had not changed her course that I could see. At the time we came together, our engine was reversed—backing.

Q. Could your vessel have done any more than she did to avoid the collision?

(Objected to on the ground that the foregoing mode of examination is not a proper way to elicit the truth of the case. The counsel should ask the witness, by proper inquiries, to state the history of the transaction, and let the court judge from the whole case whether anything had been improperly done on the part of either vessel.)

A. No, sir.

Cross-examined by Mr. McMahon:

The schooner was half a mile off when I first saw her, I should judge.

Q. How long time elapsed from the time you first saw her till the collision?

A. Could not tell.

Q. Have you no idea of the time?
A. No, sir.
Q. What were you doing at the corner of the house just before you saw her?
A. Standing looking at the river.
Q. Was your attention occupied with anything?
A. Not in particular.
Q. Had you been on duty before that; and, if so, how long?
245 A. About one hour.
Q. How long had you been off duty just before you saw the vessel?
A. About one hour.
Q. What were you doing during that hour?
A. In the room part of the time, and part of the time on deck.
Q. In what room?
A. In our room.
Q. Had you turned in?
A. No, sir.
Q. About how long had you been in your room during that hour?
A. Can't state exactly.
Q. Can you give us any idea of it?
A. No, sir.
Q. How much of the hour had you been on deck?
A. Can't tell exactly.
Q. Can you give us any idea of it?
A. No, sir.
Q. How came you on that night, while standing by the front of the house, to look at the schooner?
A. I could not help but see her.
Q. What first called your attention to the schooner?
A. Nothing more than any other vessel sailing down the river.
Q. Had she been reported then?
A. Not to my knowledge.
Q. Could you see her readily?
A. Yes, sir.
246 Q. How far were you abaft of the top-gallant forecastle deck at that time?
A. I should judge about 15 or 20 feet.
Q. How far where you stood was it below the top-gallant forecastle deck?
A. Never measured it.
Q. About how far?
A. Some four or five feet.
Q. Were there bulwarks or a rail on the side of the vessel around the top-gallant forecastle deck to the bows?
A. I think not, sir.
Q. Could you readily see the schooner and her course from where you stood?
A. Yes, sir.
Q. Was there anything particular about the course of either vessel which attracted your attention at the time you first saw the schooner?
A. No, sir.
Q. How long did you remain in the position you were in when you first saw her?
A. Should judge about one minute.
Q. What then did you do?

A. Stepped back to the room door.
Q. About how far off was that?
A. Some six or eight steps.
Q. On the port side of your vessel?
A. Yes, sir.
Q. While doing this, was the schooner out of your view?
A. Yes, sir.
247 Q. What was it that attracted your attention and called you back to the room door?
A. Some one spoke to me. I am not positive what it was.
Q. Have you no recollection what it was?
A. Nothing particular.
Q. Anything in general?
A. No, sir.
Q. How long did it take you to go back to the room door, and how long were you there?
A. Could not state exactly.
Q. Have you any recollection of the time?
A. A minute or so. I can't say.
Q. After you had stepped back to the room door, what then did you do?
A. I am not positive what I did do.
Q. Have you any recollection what you did?
A. No, sir.
Q. When you first saw the schooner, on what course was she by compass?
A. Not knowing, I could not tell.
Q. At that time on what course was the steamer by compass?
A. Not knowing, couldn't tell.
Q. Tell us the course of the schooner at the time you first saw her.
A. Couldn't tell.
Q. Tell us the course of the steamer when you first saw the schooner?
A. Not knowing, could not tell.
248 Q. How long was it after you first saw the schooner that you heard the engine-bells ringing?
A. Couldn't exactly tell.
Q. Have you no idea of the time?
A. No, sir.
Q. How many bells did you hear ringing?
A. Did not stop to count them.
Q. How long were they ringing?
A. Couldn't state exactly.
Q. Can you give us any idea of the length of time?
A. No, sir.
Q. Were there intervals of time between the ringing, or were they rung together?
A. I think there were intervals.
Q. Do you know what the engine-bells are on that vessel?
A. Yes, sir.
Q. How many bells do you ring to slow, to stop, and to back?
A. Four bells is customary, sir.
Q. Distinguish them.
A. One to slow; one to stop; two to back.
Q. Do you mean to swear positively that those four bells had been rung before you saw the schooner crossing your bows?
(Objected to on the ground that the witness has already testified that he did not know how many bells were rung.)

A. I am not positive about the bells.

249 Q. Did you mean to swear positively that any of them had been rung before you saw the schooner crossing your bows?

A. Yes, sir.

Q. What is the best of your recollection as to how many of them had been so rung?

A. I am not positive how many.

Q. Question repeated.

A. I did not count them particular.

Q. Question repeated.

A. I heard some three or four.

Q. Were they rung quickly, or sharply?

A. I think they were, sir.

Q. About how long time elapsed between the ringing of the bells and this actual contact of the two vessels?

A. Could not state exactly.

Q. Have you no idea as to time?

A. No, sir.

Q. None whatever?

A. No, sir.

Q. How many could you count between these times?

A. Never tried it.

Q. How many do you think you could?

A. That depends on how fast I could count.

Q. How many do you think you could so count, provided you counted as fast as you could?

A. Can't answer that, sir.

Q. About how fast was the steamer going when you knocked off and turned in that evening?

A. I wasn't turned in.

Q. About how fast was the steamer going when you stood at the corner of the house?

250 A. Should judge some five or six knots.

Q. After the ringing of the bells, what did you do?

A. I ran forward.

Q. Where to?

A. To the corner where I stood before.

Q. How long did that take you?

A. Probably a second.

Q. What did you do then?

A. I didn't do anything.

Q. How long did you stay there doing nothing?

A. Can't answer it.

Q. What did you do next?

A. Went up forward on the forecastle deck.

Q. What did you do there?

A. I saw the schooner.

Q. How far was she off?

A. She was under our bows.

Q. Had you come together?

A. Yes, sir.

Q. How long did it take you to get on the forecastle deck?

A. About half a minute.

Q. Did she strike while you were getting on the forecastle deck, or did she strike before?

A. She struck before.

Q. Had you heard the blow before you left the forward main-deck?
A. I could not hear it as I know.
Q. Had she struck before you left the main-deck?
A. Yes, sir.
251 Q. Were there any men about on the main-deck forward?
A. I think there were.
Q. Running about or forward?
A. No, sir.
Q. Did you see this first mate there or anywhere just before the collision?
A. I think I did.
Q. Where was he?
A. I saw him up forward.
Q. Forward where?
A. Forecastle deck.
Q. Did you see him go up there?
A. No, sir.
Q. Did you see him run out to go up there?
A. Not that I know of.
Q. Did you hear any order given by the first mate before the two vessels came together?
A. No, sir.
Q. Did you hear any order given by any one before the collision?
A. No, sir.
Q. Did you hear any whistle before the collision?
A. I am not positive.
Q. Have you any recollection of any whistle being blown on your vessel before the collision?
A. No, sir.
Q. Where you not below and turned in just prior to the collision?
A. No, sir.
Q. What was the course of the schooner when you saw her while
252 standing at the corner of the house, after hearing the bells?
A. I can't tell her course exactly by compass.
Q. Tell us the course of the steamer at that time.
A. Couldn't tell.
Q. When you went on this forecastle deck, just describe how the two vessels lay together.
A. The schooner lay nearly athwartships the river; our vessel lay headed up the river.
Q. Your vessel on top the schooner?
A. No, sir.
Q. Were your bows into her?
A. No, sir.
Q. Had they been into her?
A. I think not, sir.
Q. Did you observe your bows touching her at all?
A. No, sir.
Q. Did you observe whether your bows had touched her?
A. No, sir.
Q. Do you know how the wind was that night?
A. About northwest.
Q. What time of night was this?
A. Just twylight.
Q. How far off could you distinguish objects on the water?
A. About half a mile.

Q. Before the collision, did you hear any hail given on board your vessel?

A. No, sir.

Q. Did you take any particular notice when you first saw the
253 schooner, about her course and direction compared with that of the steamer?

A. Yes, sir.

Q. Did you see this where you were standing?

A. Yes, sir.

Q. What made you take this particular notice?

A. I am always observing things when I am on the water.

Q. Then why did you not observe the whistle which the first mate testifies was blown?

A. I can't tell.

Q. Was the captain on deck just before or at the time of collision?

A. Am not positive.

Q. Have you no recollection of the captain coming out on deck at the moment of the collision, or just before it, either on the main-deck or hurricane deck?

A. No, sir.

Q. Have you no recollection of seeing the captain there at that time?

A. No, sir.

Q. Who were in the pilot-house?

A. I think Mr. Cain, the other quartermaster.

Q. Nobody else?

A. Don't know anybody else.

Q. Whose watch was it to be at the wheel?

A. Mr. Cain's; Cain relieved me.

Q. When you were relieved, who did you leave in the pilot-house?

A. I think the pilot was there.

254 Q. Anybody else?

A. Not that I know of, sir.

Q. Was there any look-out there when you left?

A. Yes, sir.

Q. Who?

A. The pilot.

Q. No other look-out but him?

A. Yes, sir.

Q. Who?

A. Mr. Wood.

Q. What was he?

A. Before the mast.

Q. Where was he stationed?

A. Forward.

Q. Where?

A. Forecastle deck.

Q. Had you any other look-out stationed for that purpose?

A. Not that I know of.

Q. Did you, from the time you first saw the schooner up to the time of the collision, hear a single hail or report given by the look-out?

A. No, sir.

Q. Did you before that hear any such—that is, after your being relieved?

A. No, sir.

Q. Did you observe anybody go up to or in the pilot-house after your being relieved, up to the time of the collision?

255 A. No, sir.

Re-direct:

I left Cain in the wheel-house when I left.

JOS'H A. JACKSON.

Subscribed and sworn to before me this 10th day of March, 1866.

JOHN A. OSBORN,
U. S. Commissioner.

256

257 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this seventh day of March, in the year of our Lord one thousand eight hundred and sixty-six, I, John A. Osborn, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Charles W. Adams, to testify and the truth to say on the part and behalf of the claimants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States, for the , at New York City, in the district aforesaid, wherein Benjamin F. Town et al., libellants, against the steamship Western Metropolis, her tackle, &c., respondents.

And the said Charles W. Adams being about the age of thirty years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Charles W. Adams, and he did thereupon depose, testify, and say as follows, viz:

I was mate of the "Western Metropolis" at the time of the collision with the schooner "Mary C. Town" in the Potomac River. I was on the top-gallant forecastle, standing by the anchor. The vessel was about anchoring. We had been running half speed some 20 minutes before the collision. At the time we first saw the schooner we were running half speed. She bore from us, when we first saw her, about 2½ points on our starboard bow.

Q. If the schooner had kept that course, would there have been any collision?

A. No, sir. After we first saw her she immediately kept off; i. e., ported her wheel. She was on the port tack. She had the wind
258 free. We were expecting to come to an anchor, and we stopped and commenced backing.

Q. If she had not changed her course, which side of you would she have gone, and how far?

A. She would have gone a mile to the windward of us on the star-

board side. There was nothing else we could have done, which we might have done, to avoid a collision. There was a whistle blown on board of our vessel. One long blast of the steam-whistle was given. That was to let the schooner know that we saw her. I have been to sea for fifteen years.

Q. Do you know of any rule or practice by which one long blast of a steamer's whistle requires a sailing vessel to get out of the way, or do anything but keep her course?

A. Nothing, sir; but keep her course. Half speed was probably five knots. Her full speed was probably 9½ or 10 knots.

Cross-examined by McMahon.

Q How far off was the schooner when you first saw her?

A. I should judge a mile or mile and half.

Q. How long a time elapsed between your first seeing her and the actual collision?

A. About 8 minutes, I should judge.

259 Q. Where had you been prior to being on the top-gallant forecastle?

A. On the hurricane deck, by the pilot-house.

Q. Had you been in the pilot-house before going on the top-gallant forecastle?

A. No, sir.

Q. Had you been under deck just before the collision?

A. No, sir.

Q. Had you been under the hurricane deck just before the collision, or before you went up to the pilot-house?

A. (Witness answers:) What might you call just before? I was under the hurricane deck, and left there at 5 o'clock and came up on the hurricane deck.

Q. How long had you been on the top-gallant forecastle prior to your seeing the schooner?

A. Twenty minutes.

Q. During that twenty minutes did you have the schooner in sight?

A. No, sir.

Q. How long had you been on the hurricane deck by the pilot-house before you went on the top-gallant forecastle?

A. I should judge two hours.

Q. Had you during that two hours descended inside under cover?

A. No, sir.

Q. Did you go from the hurricane deck directly to the top-gallant forecastle?

A. I did, sir.

260 Q. How came you to go to that place from the hurricane deck?

A. By the order of the pilot.

Q. Who was your pilot on that occasion?

A. I don't know his name. He joined the ship in the Chesapeake Bay, at the mouth of the Potomac River.

Q. Was his name Leon Katzenburg?

A. I don't know any other name than pilot.

Q. What first attracted your attention to the schooner?

A. I don't know that I can give an answer to that question, what first attracted my attention.

Q. Were you not in the mess-room when the schooner was reported?

A. No, sir.

Q. Did you not hear the 2nd mate order the wheel of your vessel aport?

A. No, sir.

Q. Did you not order the wheel astarboard?

A. No, sir.

Q. Did anybody in your hearing order your wheel astarboard?

A. No, sir.

Q. Was the wheel of your vessel put astarboard just before or at any time after seeing the schooner?

A. Not to my knowledge?

Q. Did you remain on the top-gallant forecastle after seeing the schooner, up to the time of the collision?

261 A. I did, sir.

Q. Was the schooner reported before you saw her?

A. No, sir.

Q. Who saw her first on your vessel?

A. I can't say who saw her first. I reported the vessel to the pilot.

Q. What did you say?

A. I sung out, "Sail, ho!" Pilot said, "Where away?" I replied, "2½ points on our starboard bow."

Q. Had the schooner been reported before that?

A. No, sir; nor after that.

Q. What time of night?

A. I should judge about seven and a half o'clock.

Q. You say the schooner was on the port tack. Explain what you mean by that.

A. There are two sides to a vessel, starboard and port; what we call a vessel on the port tack is when she has the wind on the port side.

Q. How was the schooner heading so far as the courses of the river?

A. She was running down the river, in the line of the river.

Q. Do you know the course of the river by compass there?

A. No, sir; I do not.

Q. How was the steamer heading when you first saw the schooner? Give us by compass.

A. Don't know by compass.

262 Q. Then, by course of the river, how?

A. We were heading up the river.

Q. Were the two vessels, when you first saw the schooner, heading on courses which, if lines were protracted from their respective stems, would have intersected each other?

A. No.

Q. How far apart from each other would those lines have come if protracted?

A. One mile.

Q. In what direction would the schooner have passed, in that event, the steamer?

A. On our starboard side.

Q. Had the schooner a light up when you first saw her?

A. No, sir.

Q. Did you observe any light on her at all?

A. No, sir.

Q. At any time?

A. At no time.

Q. What could you distinguish about her when you first saw her?

A. I could distinguish that she was a fore-and-aft schoner; that she was running free with the wind on her port quarter.

Q. Just describe the circumstances that took place between the two vessel after you first saw the schooner, and just up to the point of collision.

A. I don't exactly understand what you want me to describe.

263 When I reported the vessel I reported to the pilot. His reply to me was that he saw her. He asked me if our anchor was all ready. My reply was that it was. Our engine was stopped and reversed. In the meantime the schooner ported her wheel; kept off, with intention of crossing our bow, and in doing so the schooner struck amidships against our stem. That's the history.

Q. Where do you put in the whistle?

A. When we first saw that she altered her course.

Q. How far were you apart when your whistle was blown?

A. I should judge ½ mile.

Q. What was the course of your vessel at that time?

A. By compass? I don't know.

Q. Have you no other answer?

A. Our course was up the river.

Q. Can you give no other answer as to the course of your steamer than it was up the river?

A. That is all the answer I can give.

Q. Can you tell the course of the river at that point by compass, or in any other way?

A. No, sir.

Q. Can you give us the direction of the wind before and up to the time of the collision?

A. The wind was N. N. W.

Q. About how far off from you was the schooner when she changed her course?

A. I should judge ¾ of a mile.

264 Q. How fast was the schooner going?

A. I don't know, sir.

Q. About how many knot breeze was blowing?

A. About eight-knot breeze.

Q. Had you slowed your vessel before seeing the schooner?

A. Yes, sir.

Q. Were you all in readiness then to let the anchor down?

A. Yes, sir.

Q. How many men were with you on the deck?

A. On the forecastle?

Q. Yes.

A. Four men.

Q. Was there much confusion on board steamer?

A. Not any at all.

Q. Did you yourself run out from under the hurricane deck; run forward on the top-gallant forecastle, and give an order to starboard the wheel?

A. No, sir.

Q. Did any circumstance like that occur, so far as you are concerned, that night?

A. Not to my knowledge.

Q. Were you the first mate of the vessel?

A. I was.

Q. Who was second mate?

A. George Cowan.

Q. Did any such circumstance occur on his part that night?

A. Not to my knowledge.

Q. Who was captain?

265 A. William B. Hilton.

Q. Did any such circumstance occur on his part that night?

A. No, sir; the second mate was standing at that time by the chain-cable forward; the captain was in the pilot-house; the quartermaster and pilot were in the pilot-house beside the captain; nobody else to my knowledge.

Q. Was anybody outside by the pilot-house?

A. Yes, sir; the second quartermaster; nobody else to my knowledge.

Q. When you went on the top-gallant forcastle, it was to put out the anchor, was it not?

A. I went there, sir, to have my anchor all clear for letting it go; I took those men there for that purpose.

Q. Was you engaged in getting your anchor clear when you first saw the schooner?

A. No, sir.

Q. Had you commenced to clear your anchor before you saw her?

A. Our anchor was all clear before I saw her, at least 15 minutes.

Q. What was you doing?

A. I was standing by my anchor.

Q. Had you selected your anchorage ground before you saw the schooner?

A. I don't know, sir, as I am no pilot on the Potomac River.

Q. How much time elapsed from your first seeing the schooner

266 and her first changing her course?

A. I should judge ten minutes.

Q. How long before the collision was it before you heard the whistle blown?

A. From eight to ten minutes.

Q. How long after first seeing the schooner was it that you heard the whistle blown?

A. About 15 minutes, I should judge.

Q. Up to the blowing of the whistle, was the schooner in sight?

A. She was.

Q. What were you doing during the twelve or fifteen minutes?

(Objected to.)

A. Standing by my anchor.

Q. Were you watching the schooner?

A. After I saw her I was watching her.

Q. What made you watch her during all that twelve or fifteen minutes?

A. I can answer, two reasons; the first reason was because I had nothing else to do; the second reason was because she steered so badly.

Q. About how fast was the steamship going when the whistle was blown?

A. About two knots. Don't know what the tide was that night.

Q. Did you observe any change in the course of your steamer after you first saw the schooner up to the time of the collision?

267 A. No, sir.

Q. Was anything else done on your steamer after first seeing the schooner, than blowing the whistle, up to the time of the collision?

A. Yes, sir.

Q. What?

A. Our engine was reversed.

Q. Anything else?

A. No, sir.

Q. How far off was the schooner when your engine was reversed?

A. I should judge ½ mile.

Q. Suppose instead of reversing your engine you had ported your helm when the schooner was ½ mile off, would the collision have taken place?

A. Yes, sir; and more fatal to the schooner.

Q. Where would you have [have] struck her?

A. Would have struck amidships, and gone over her.

Q. In what general direction was your steamer heading when you reversed your engine?

A. Heading up the river.

Q. Do I [you] understand you that from the time you first saw the schooner until you came in contact with her, the general direction of your steamer was on the same course up the river?

A. Yes, sir.

Q. Suppose at any time after first seeing the schooner you had
268 ported your helm, would the collision have taken place?

A. That, sir, I cannot answer.

Q. What movement of the schooner's helm was necessary to take her across your bows?

A. Port her helm.

Q. Hard or otherwise?

A. Hard aport.

Q. Suppose when she ported her helm your steamer had sprung her wheel hard aport, would the collision have taken place?

A. It would; because our steamer had not steerage-way on at the time.

Q. How long did it take to blow the whistle?

A. Probably fifteen seconds.

Q. Do you blow whistles when you meet sailing vessels?

A. It is customary to blow one blast of the whistle for a sailing vessel.

Q. Where did you ever see it done?

A. In my experience going to sea.

Q. How many times?

A. Could not tell you within a handfull of times; I never noted them down.

Q. When you meet a steam-vessel you sometimes blow a single blast, do you not?

A. Yes, sir.

Q. What for?

A. Two steamers meeting, one blast means for each vessel to port helm.

269 Q. Did you ever know that rule to be applied to a steamer meeting a sailing vessel—i. e., each vessel porting her helm, by one blast?

A. No, sir.

Q. Where did you first hear of any such custom of navigation as you spoke of in your direct, about giving a warning by a whistle?

A. When I first went in steamships.

Q. How long has that been?

A. Four years, sir.

Q. How do you know that that was the object of that long blast on that night?

A. I know because there was nothing else in view, neither sailing or steam.

Q. That's all the way you know it?

A. Yes, sir.

Q. You are sure then that whistle was blown after the vessel changed her course?

A. Yes, sir.

Q. Did the schooner after that whistle change her course?

A. She did.

Q. In what way?

A. She kept off, and jibed her main boom; and got the wind on her starboard quarter.

Q. How far was she off when that occurred?

A. When she jibed her main boom she was probably six times her length.

270 Q. How much time elapsed between that time and the time of the collision?

A. I should judge from three to four minutes.

Q. Was she not keeping off when the whistle was blown?

A. Yes, sir; she had altered her course from her course when first seen.

Q. Suppose she had not jibed her main boom, would the collision have occurred?

A. It would the way he was steering, if he had not altered her course.

Q. Do I understand you mean that the collision was brought about by the original alteration of her course; that is, keeping off?

A. I do.

Q. If that is so, then why did your vessel blow a long blast for the schooner to keep on her course, after she had changed her course?

A. Her course was changed ½ dozen times, and we blew the whistle to let her know that we saw her.

Q. How came you not to tell about these ½ dozen changes of course before, when I asked you to give a history of the circumstances of the collision?

A. When the vessel would swing off one or two points, I did not deem it necessary to explain all those little items.

271 Q. Do you call ½ dozen changes of course, under these circumstances, little items?

A. I do.

Q. Where did you strike the schooner?

A. The schooner struck us.

Q. Where?

A. On our stem; the schooner's port side near amidships struck our stem.

Q. What was the effect on the schooner?

A. I don't know; was not on board of the schooner.

Q. Was anything done by your vessel immediately after the collision?

A. We still remained backing till we backed clear of her.

Q. Then what did you do?

A. Let go our anchor.

Q. Was that all you did?

A. That was all.

Q. How far off was your vessel anchored from the place of the collision?

A. I should judge about 600 yards.

Q. Was anything done on your vessel after these two vessels came together to aid the schooner, or to look after her?
A. There was not, as she needed no assistance.
Q. Was she sinking?
A. Not to my knowledge.
Q. Did you look to see?
A. I kept sight of her after we got clear; she kept on sailing down the river.
272 Q. How far did you see her sail down the river?
A. That I could not answer, as I was busy with my anchors.
Q. How far into the schooner did your vessel go?
A. I don t know; the shock did not amount to anything; should judge not far, as I heard nothing give way.
Q. Did you understand at that time that your vessel had gone into the schooner so far as to have her in a sinking condition?
A. No, sir.
Q. What injury was done to your vessel?
A. Her facing on the stem was started very little.
Q. Anything else?
A. No, sir.
Q. Do you recollect a man coming on board the steamer from the schooner, after that collision?
A. There was a man came on board at the time of the collision?
Q. Did you have any talk with him?
A. I did.
Q. How long had you been on that steamer?
A. At the time of the collision?
Q. Yes.
A. Three months.
Q. Had any other collision occurred between your vessel and any other vessel prior to the collision?
273 (Objected to.)
A. No, sir.
Q. Did any occur afterwards?
(Objected to.)
A. Yes, sir.
Q. Did you sink a schooner after that time in the Sound?
(Objected to.)
A. Not in the Sound; on Nantucket Shoals we did.
Q. Did you blow the whistle in that case?
(Objected to.)
A. No, sir.
Q. Did that take place at night-time?
(Objected to.)
A. Yes, sir.
Q. Had you charge of the deck then?
(Objected to.)
A. I had.
Q. All hands lost on the schooner?
(Objected to.)
A. I believe not.
Q. Any lost?
(Objected to.)
A. They reported two.
Q. What part of the river did this collision take place in?
A. Took place below what is termed "Kittle Bottom."

274 Q. Nearer which shore?
A. Nearer the Virginia shore.
Q. How far off?
A. Judge 1½ miles off.
Q. How wide is the river there?
A. Judge 3½ to 4 miles.
Q. How wide is the channel?
A. Don't know.

Re- direct:

Q. How far was the anchor from the pilot-house?
A. Judge 50 feet; did not look at any watch to ascertain any of the times I have stated—all the changes I speak of, by the schooner's keeping off.

CHARLES W. ADAMS.

Subscribed and sworn to before me this seventh day of March, 1866.
JOHN A. OSBORN,
U. S. Commissioner.

275 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this sixth day of June, in the year of our Lord one thousand eight hundred and sixty-six, I, John A. Osborn, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789 did call, and cause to be and personally appear before me, at my office at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, William Kain, to testify and the truth to say on the part and behalf of the claimants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York City, in the district aforesaid, wherein Benjamin F. Town et als. are libellants, vs. the steamship "Western Metropolis," her tackle, &c.

And the said William Kain being about the age of thirty-two years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said William Kain, and he did thereupon depose, testify, and say as follows, viz:

I am now farming in the State of Illinois. Formerly I was a sailor. I was on board of the Western Metropolis at the time of collision with the "Town." Was quartermaster on the "Western Metropolis." I was at the wheel at the time of the collision; had been there one hour and thirty minutes. I saw the schooner "Town." When I first saw her, she was from two points to two and a half on our starboard bow. We were going at half speed, under one bell, when I first saw her. If the

vessels had continued on those courses, it would have been im-
276 possible to [to] have had a collision. The man on the look-out sung out "Sail ho!" just after I saw her. The pilot answered, "All right." After this the captain gave one long blast of the whistle. The schooner kept away before the wind right towards us. Then three bells were struck by the captain to the engineer. I mean the engine-bells, and the wheel was put hard astarboard.

Q. Could anything else have been done on your vessel to avoid the collision?

A. No, sir. Nothing more than what was done. When going slow three bells mean, one to stop her, two bells to back her.

Cross-examined by Mr. McMahon:

I live in Bond County, Illinois, at place called Willow Branch. Have lived there thirteen or fourteen months. I came on here on the thirteenth of May. I came on my own private business.

Q. Did you not come on because you were written for in this case?

A. Partly on my own business and partly under the letter.

Q. Would you have come on at this season of the year if it had
277 not been that you were sent for in this case?

A. I was going to come on my own business at this season of the year.

Q. What was promised you when you were sent for?

A. Nothing, sir, whatever.

Q. Did you not demand three or five hundred dollars to come on here from any one?

A. No, sir.

Q. Who pays your expenses for coming on?

A. I don't know the man. I do not expect to pay my own expenses.

Q. Not when you have private business of your own to attend to?

A. No, sir; not when I was sent for.

Q. You were then sent for, were you?

A. Some government officer came and took me.

Q. What did the government officer say to you when he took you from home?

A. He said he was ordered by the authorities to take me as a witness, and I told him I could not go unless my passage was paid. He said the authorities would send me.

Q. What then occurred?

A. Nothing that I am aware of.

Q. Did he show you any warrant to bring you?

278 A. Yes, sir.

Q. Did you read it?

A. No, sir.

Q. Did he tell you what it was?

(Objected to.)

A. He did not know it himself, or he did not understand the nature of it.

Q. Did you come away with him to New York?

A. I came with him, but not to New York.

Q. Where did he part with you?

A. At the first railway station.

Q. What did he say to you when he parted with you?

A. He bade me good-bye.

Q. Did he give you any money?

A. No, sir; he did not.

Objected to.

Q. Did he give you any directions?
A. No, sir.
Q. Did he pay your passage?
A. No, sir.
Q. Who paid your passage?
A. I don't know the man.
Q. How did you know your passage was paid?
A. The man gave me a railway ticket.
Q. Where did he give it to you?
A. At the railway station, sir.

Q. Did he tell you where you were to go to when you got
279 to New York?

A. No, sir.
Q. Had you heard before where you were to go to?
A. No, sir.
Q. How long were you on the way?
A. Two days and two nights.
Q. Where did you go to when you came to New York?
A. I went to Messrs. Benner and Brown's office, and reported.
Q. How came you to go there?
A. I knew it from the sence of the dispatch the man read to me.
Q. What was that sence he read to you?
A. He read to me that the United States had called me to the bar to give the truth and nothing but the truth in reference to this collision.
Q. Did it state in this dispatch, as he read it to you, that that bar was situated in Benner's and Brown's office.
A. No, sir; it did not.
Q. Then I want to know how it came that you knew that you were to go to Benner's & Brown's office.

A. The vessel's name was in the dispatch.

280 Q. Give us as near as you can from recollection the contents of that dispatch as he read it to you.

A. It read something like this:
The United States government called me here to New York to prove all I knew was true in the collision between the Western Metropolis and the schooner—I disremember the name of the schooner—that happened in the Potomac River, and that I was at the wheel at the time. That is all.
Q. Had you been written to by Benner and Brown or any one before that to come on here, and state what you knew about the collision?
A. I got two letters, but I could not tell who wrote them. The two letters are burnt, I guess.
Q. Did you answer those letters?
A. No, sir.
Q. Are you sure of that?
A. Yes, sir.
Q. When did you receive those letters?
A. I disremember the time.
Q. Did they state they wanted you to come on?
A. I could not say what they stated, as I had the chills at the time. I had not the chills when the officer came after me.

281 Q. Did these letters make any promises to you?

A. I was very bad with chills and fever and could not read them.
Q. Did you ever read them?
A. No, sir.

Q. How do you know that they related to this case?
A. My sister got somebody to read them.
Q. Was any answer sent to them by anybody on your behalf?
A. I don't know.
Q. Did you ask anybody to write an answer to them?
A. No, sir.
Q. Did your sister do so?
A. I don't know what she did.
Q. What took place between you and Benner and Brown?
A. Nothing, sir.
Q. Did they tell you when you were wanted?
A. They didn't say anything at all about it.
Q. Did anybody tell you when you were wanted?
A. A small boy did.
Q. When did he tell you?
A. He came up and showed me the court-house to-day; I have been here since the 13th of May, doing nothing much; have been here waiting on this case.

282 Q. Who told you to wait?
A. No one; I was to wait until I was called upon.
Q. Who told you to wait until you was called upon?
A. Mr. Brown told me to wait.
Q. When?
A. I could not say what day it was.
Q. How long after you had been here?
A. I could not exactly say.
Q. Can you say about the time?
A. No, sir.
Q. Have you no memory on the subject?
A. No, sir.
Q. What did Mr. Brown tell you?
A. He said it would come off in a day or two, sir.
Q. Did he say how your expenses were to be paid?
A. No, sir.
Q. Was anything said to you about your expenses?
A. No, sir; not a word.
Q. Have you been paying your own expenses since the 13th of May?
A. Yes, sir.
Q. From whom do you expect payment.
A. I don't know, sir.
Q. Has anybody promised to pay you?
A. No, sir.

283 Q. Have you demanded of any one $300 or $500, or any sum, to come on here and give your testimony in this case?
A. I have never demanded a cent.
Q. Have you not written to that effect to some one here in New York?
A. Never, sir; nothing of the kind.
Q. Have you not said so to some one before you came on here? (Objected to.)
A. No, sir.
Q. How did you know that you had been 1 hour and 30 minutes in the pilot-house before you saw the schooner?
A. By the clock in the pilot-house; I looked at the clock as soon as I saw the schooner.
Q. What made you do so?

A. Because it was my place.

Q. Was it a part of your duty at that time to look at the clock whenever you met a sailing vessel, in order to see how long you had been in the pilot-house before you saw her?

A. It was; I struck seven bells.

Q. Was it your habit to do so?

A. Yes, sir.

Q. When did you go in the pilot-house that afternoon?

A. At six o'clock.

284 Q. Whose watch on deck at that time, six o'clock?

A. It was my watch on deck.

Q. Who had charge of the watch on deck at that time?

A. I disremember whether captain or mates; all hands were on deck, mate and captain.

Q. How many nights had you been out [out] of port?

A. I couldn't tell.

Q. Was it not the second night you had been out of port?

A. I disremember; I have no memory about it.

Q. How do you come to remember that it was 7½ o'clock when you first saw the schooner?

A. I struck seven bells; a very good mark.

Q. Did you ever strike seven bells on any other occasion?

A. Strike it when the hour comes.

285 Q. Do you recollect what occurred on the night before when you struck seven bells?

A. No, sir.

Q. Do you recollect what occurred the night after when you struck seven bells?

A. No, sir.

Q. Then please to state how it comes that you recollect seeing this schooner on that night precisely at the moment of striking seven bells.

A. I didn't see her just at the moment, but as I turned around to the wheel I couldn't stop my eyes from seeing her.

Q. Did you have to leave the wheel to strike the bells?

A. No, sir; one hand on the wheel and one hand reached the bell.

Q. Who else was at the wheel with you?

A. Nobody but myself.

Q. Who was in the pilot-house?

A. The captain, pilot, and me.

Q. Who had charge of the wheel?

A. I had charge of the wheel by the pilot's orders.

Q. Did you take any direction from the captain?

A. I did, sir.

286 Q. What direction?

A. I put the wheel hard astarboard by his orders.

Q. Before or after the whistle blew?

A. Immediately after the whistle blew.

Q. How soon after? State it in seconds.

A. I could not do it, sir.

Q. How many could you count?

A. I don't know; never tried.

Q. Could you give an idea?

A. No, sir.

Q. How long a time elapsed between your first laying eyes on the schooner and the collision?

A. A very short time.

Q. About how long?
A. Could not exactly say.
Q. How long do you think?
A. Couldn't swear.
Q. Was it two minutes?
A. Could not say.
Q. Can you give us any idea of the time?
A. The time was very short.
Q. Question repeated.
A. I could not swear to the time; it was very short.
Q. Question repeated.
A. Have no idea of the time.

Q. How far off was the schooner when you first saw her?
287 A. I don't know, sir. Never measured the distance.

Q. Have you no idea in your mind how far off the schooner was when you first saw her?
A. No idea; she was a very short distance.
Q. Had you heard her reported more than once?
A. No, sir.
Q. How long was it that the captain blew the whistle after you first saw the schooner?
A. A very short time.
Q. Have you no idea of that time?
A. No, sir.
Q. Could you in any way give us an idea of the length of time?
A. No, sir; I kept no record.
Q. Before the captain ordered you to put the helm hard astarboard, had you heard any hail from below or from the top-gallant forecastle deck to starboard your helm?
A. No, sir; the pilot was in charge.
Q. Before you shipped your helm hard astarboard, how had you had it?
A. I had it both port and starboard.
Q. Which was the first way you had it?

A. I couldn't tell.
288 Q. What was the way of the wheel when the captain ordered it hard astarboard?
A. I disremember.
Q. How long had it been in that way before it had been changed hard astarboard?
A. I could not say, sir.
Q. Have you no idea?
A. No, sir.
Q. How many changes had there been of your helm prior to your putting it hard astarboard for ten minutes?
A. None, sir.
Q. During that ten minutes what had been the way of your helm?
A. Hard to starboard.
Q. Explain what that is.
A. Putting the ship's head to the left.
Q. Explain the difference of the two movements, hard to starboard and hard astarboard?
A. There is no difference.
Q. Then do I understand you to mean that you had been putting your helm hard to starboard during the 10 minutes prior to the captain ordering you to put it hard astarboard?

A. You can put it hard astarboard in two seconds.

Q. Question repeated.

289 A. No, sir.

Q. Had you put your helm hard astarboard before the captain ordered you to do so, after you first saw the schooner?

A. No, sir.

Q. After you first saw the schooner and before you put the helm hard astarboard, what way had your helm been?

A. Both ways.

Q. That is, port and starboard or starboard and port?

A. Either way. I couldn't swear which way.

Q. Had it during that time been hard aport?

A. No, sir.

Q. How far aport had it been?

A. I could not say, sir.

Q. Have you any idea?

A. No, sir.

Q. Who ordered you to have the changes of the helm of your vessel made between your first seeing the schooner and your putting it hard astarboard under the order of the captain?

A. The compass.

Q. How many points did your hard astarboard take your vessel off the course she was going at the time you put it hard astarboard, up to the time of the collision?

A. Very little.

290 Q. Question repeated.

A. I could not swear to the points. It was very little.

Q. How long was it that the captain blew the whistle after the answer made by you, after the report of "Sail ho?"

A. A very short time.

Q. How many minutes or seconds?

A. Could not say, sir.

Q. How far off was the schooner at the time the captain blew the whistle?

A. A very short distance.

Q. How many lengths of your vessel off?

A. I never measured our vessel.

Q. How many do you think?

A. I could not say, sir.

Q. Could you give us no idea whatever?

A. Couldn't say; water is deceiving.

Q. Was it within pistol-shot?

A. Could not say, sir.

Q. Could you chuck a biscuit aboard?

A. I don't know, sir.

Q. Do you think you could?

A. I don't know, sir, I am sure.

Q. Were these engine-bells rung one after the other?

A. Rung one first to stop, and then two to back her.

Q. Immediately in succession?

A. Yes, sir.

291 Q. As quick as they could be rung?

A. No, sir; they were rung right.

Q. How long was it after blowing the whistle that the schooner kept away?

A. Right away.

Q. How soon?
A. As quick as thought.
Q. She had not kept away before that, had she?
A. No, sir.
Q. Which was first in point of time, the keeping away of the schooner or the order to hard astarboard the steamer?
A. The schooner was keeping away.
Q. How long before?
A. A very short time.
Q. How many minutes?
A. I could not say.

Re-direct:

Seven bells is half past seven o'clock in the evening. We had no collision the evening before, or the evening after the collision.

Re-cross:

Q. Did you not subsequent to the collision with the "Mary C. Town" have a collision with another vessel which was sunk off "Nantuckett Shoals."

292 A. I don't know, sir.
Q. Did you never hear of any such?
(Objected to.)

The commissioner instructs the witness not to answer, thus sustaining the objection on the ground that the evidence is too remote and has no bearing on this case. The counsel for libellants insists that the question be put and answered as preliminary to a series of questions; and that the witness had charge of the helm at the time in order that he may be shown to be a person of no experience. The commissioner overrules his proposition, and instructs the witness not to answer.

WILLIAM KAIN.

Subscribed and sworn to before me this 6th day of June, 1866.
JOHN A. OSBORN,
U. S. Commissioner.

293 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on Thursday, the eighteenth day of July, in the year of our Lord one thousand eight hundred and sixty-seven:

Present, the Honorable William D. Shipman, district judge.

BENJAMIN F. TOWN AND OTHERS
vs.
THE STEAMSHIP WESTERN METROPOLIS, her tackle, &c. } 18—252.

This case having been heard on the pleadings and proofs, and argued and submitted on briefs and points by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court that the libel filed in this action be, and the same hereby is, dismissed with costs, to be taxed against the libellants. And it is further ordered, that unless an appeal be taken to this decree within the time limited and prescribed by the rules and practice of this court, that the stipulators for libellants' costs pay into the registry of the court the amount of their stipulation, and that the clerk distribute the proceeds in satisfaction of the taxed costs.

WM. D. SHIPMAN, *Judge.*

294 (Endorsed:) Vol. 18. No. 252. United States district court for the southern district of New York. Benjamin F. Town & o'rs vs. the steamship Western Metropolis, her tackle, &c. D. & T. McMahon, proctors lib'l'ts. Beebe, Dean & Donohue, proctors for cl'm'ts. Final decree. Libel dismissed with costs.
Filed the 19th day of July, 1867.

295 In admiralty.—U. S. district court, southern district of New York.

BENJAMIN F. TOWN *et al.*, appellants,
versus
THE STEAMSHIP WESTERN METROPOLIS, &c., respondents.

GENTLEMEN: Please to take notice that the libellants in the above-entitled action hereby appeal to the circuit court of the United States within and for the southern district of New York from the decree dismissing the libel therein with costs.
New York, July 26th, 1867.
Yours, &c.

D. & T. McMAHON,
Proctors Libellants and Appellants.

To BEEBE, DEAM AND DONOHUE, Esq's,
Proctors Claimants.

GEO. F. BETTS, Esq.,
Clerk of said District Court.

296 (Endoresed:) U. S. district court. B. F. Town et al. vs. Western Metropolis. Notice of appeal. D. & T. McMahon, proctors libellants & appellants.
Due service of a copy of the within notice is hereby admitted.
Dated N. Y., July 26th, 1867.

BEEBE, DEAN & DONOHUE,
Resp'ts' Proctors.

297 Circuit court of the United States of America for the southern district of New York, in the second circuit.

BENJAMIN F. TOWN *et al.*, libellants, appellants,
vs.
THE STEAMSHIP WESTERN METROPOLIS, HER tackle, &c.; Hiram Benner & others, claimants, appellees.

18—252. Bond for costs on appeal.

Know all men by these presents, that we, Benjamin F. Town, Walton Cable, and Samuel W. Chambers, are held and firmly bound unto the above-named claimants and appellees in the sum of two hundred & fifty dollars, to be paid to the said claimants; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the third day of August, in the year of our Lord one thousand eight hundred and sixty-seven.
Whereas the above-named libellants have prosecuted an appeal to the circuit court of the United States for the southern district of New York, in the second circuit, to reverse the decree rendered in the above-entitled suit by the judge presiding in the district court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named libellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

B. F. TOWN.
WALTON CABLE.
SAMUEL W. CHAMBERS.

Sealed and delivered, and taken and acknowledged, this 3rd day of August, 1867, before me.

JOHN A. OSBORN,
U. S. Commissioner.

298 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Walton Cable and Samuel W. Chambers, being duly sworn, each deposes and says, that he, Cable, resides in the southern district of New York, and Chambers in the eastern district of New York; and that he is worth the sum of five hundred dollars over and above all his justs debts and liabilities.

WALTON CABLE.
SAMUEL W. CHAMBERS.

Sworn to this third day of August, A. D. 1867, before me.

JOHN A. OSBORN,
U. S. Commissioner.

(Indorsed:) Vol. 18. Page 252. U. S. circuit court. Benjamin F. Town & others, libellants, appellants, vs. the steamship Western Metropolis, her tackle, &c.; Hiram Benner et al., cl'm'ts' app'l'ts. Bond for costs on appeal. D. & T. McMahon, lib'l'ts & app'l'ts' proctors.
Filed this 3rd day of August, 1867.

299 In admiralty.—U. S. circuit court for the southern district of New York.

BENJAMIN F. TOWN AND OTHERS, libellants and appellants,
against
THE STEAMER CALLED THE WESTERN METROPOLIS, her engine, boiler, tackle, &c.; , claimants and respondents.

To the honorable the circuit court of the United States for the southern district of New York, in the second circuit, respectfully shows, that on or about the 13th day of April, 1864, your appellants exhibited and filed their libel in the district court of the United States for the southern district of New York against the above-named steamer, her tackle, apparel, and furniture, in a cause of alleged collision, and against all persons intervening for their interests therein, praying, amongst other things, that an attachment might issue out of and under the seal of said district court against said vessel, her engine, machinery, tackle, apparel, and furniture, and that all persons having any interest therein might be cited to appear and intervene for their interests, and answer said
300 libel, and that said court would decree to the libellants and appellants, their said alleged damages, amounting to $7,875\frac{00}{100}$, and

that said vessel, her boiler, engine, machinery, tackle, apparel, and furniture, might be condemned and sold to satisfy the same, all of which by reference to said libel will more fully appear; that thereupon an attachment was issued out of said district court, under and by virtue of which the said steamship Western Metropolis was seized; that thereupon the said respondents, as owners and claimants of said steamer Western Metropolis, intervened by claim and filed stipulation in said court, upon which said steamer was released and delivered up to said claimants and respondents; that afterwards the said claimants and respondents duly filed their answer to said libel, praying, among other things, that said libel be dismissed with costs, as by reference to same will more fully appear; that said cause came on to be heard before the Honorable William D. Shipman, judge of the said district court, on the pleadings, depositions, and proofs; & after hearing the same, and the arguments of the proctors for the respective parties, and due advisement being
301 had, the said judge did order, adjudge, and decree that the said libel be dismissed with costs to be taxed against the libellants, and that summary judgment be entered therefor against the libellants and appellants, as principals, and their sureties given on the bond for costs on filing said libel, and said decree was, on the 18th day of July, 1867, entered and filed with the clerk of said district court.

And your appellants say that said decree was erroneous, inasmuch as your libellants and appellants were entitled to have a decree in their favor for the amount of their damages sustained by them and condemning said vessel in the amount thereof, and giving summary judgment against the said claimants and respondents, as principals, and their sureties on the bond given on the discharge of said vessel for the amount of their said bond.

These appellants, for these and other reasons, appeal from the whole of said decree, and from each and every part thereof to the next circuit court to be held in said district, and on the said appeal they intend to have said cause heard anew in the said circuit court on the pleadings and proofs and depositions in the said district court, and on new
302 and further allegations and proofs to be introduced in said circuit court.

And they pray that the record and proceedings in said cause may be returned to the said circuit court, and that said decree, and every part thereof, may be reversed, and that they may have a decree condemning said steamer in the amount of damages sustained by the appellants by reason of said collision, with their costs, and that such other decree may be made as to the said circuit court shall seem just.

Dated New York, July 29th, 1867.

D. & T. McMAHON,
Proctors Libellants & Appellants.

(Endorsed:) United States district court for the southern district of New York. Benjamin F. Town & others ag't the steamer Western Metropolis. Copy petition of appeal. D. & T. McMahon, proctors appellants, 13 Chambers street, N. Y. City.

Original admit. & filed Aug. 3rd, '67.

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305 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second

circuit, held at the city hall in the city of New York, on Tuesday, the 16th day of June, in the year of our Lord one thousand eight hundred and sixty-eight:

Present, the Honorable Samuel Nelson, an associate justice of the Supreme Court of the U. S.

BENJAMIN F. TOWN *& als.*, lib'l'ts & app'l'nts,
vs.
THE ST'SHIP WESTERN METROPOLIS, HER engine, &c.; Hiram Benner & al., cl'n'ts & appellees.

The appeal in this cause coming on to be heard, Mr. D. McMahon reads testi'ny from the apostles, and is heard on part of lib'l'ts & app'l'nts. M. C. Donohue read, testi'ny from the apostles, and is heard on part of cl'nts & appellees.

Cur. ado. vult.

306

307 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on Wednesday, the 14th day of October, in the year of our Lord one thousand eight hundred and sixty-eight:

Present, the Honorable Samuel Nelson an associate justice of the Supreme Court U. S.

BENJAMIN F. TOWN *& al.*
vs.
THE STEAMSHIP WESTERN METROPOLIS.

This appeal coming up before this court, and after hearing D. McMahon, esq., for lib'l'ts & appellants, in support of the appeal, and Charles Donohue, esq., for the appellees, opposed; and mature deliberation in the premises being had, it is ordered and adjudged that the decree of the dist. court below be, & the same is hereby, reversed with costs, [and that a decree be, and the same is hereby, in all things reversed with costs;] and that a decree be, and the same is hereby, rendered in favor of libellants ag'st the said vessel for the damage in suit, and that it be referred to one of the commissioners of this court to take proof of
308 the amount due the libellant, and to report them with all convenient speed.

309 Circuit court of the U. S. for the southern district of New York.

BENJ. F. TOWN AND OTHERS, libellants and appellants,
vs.
THE STEAMSHIP "WESTERN METROPOLIS," her tackle, &c.; , claimants and appellees.
Commissioner's report.

In pursuance of a decretal order made in the above-entitled cause on the 14th day of October, 1868, by which, among other things, it was reffered to the undersigned, one of the commissioners of this court, to ascertain and compute the amount due the libellants for damages sus-

tained by reason of the collission in the libel mentioned, and to report thereon to this court with all convenient speed:

I, Kenneth G. White, the commissioner to whom the matter was referred, do report that I have been attended by the proctor for the libellants, and by the proctor for the claimants, and have taken and examined the testimony offered in support of the libellants' claim, (no testi-
310 mony being offered on part of claimants,) and do find that there is due to the libellants as follows, viz.:

For loss of cabin furniture	$75 —
" " " galley tools	60 —
" demurrage (agreed upon by parties)	1,150 —
" raising vessel	1,500
" bill of Cooper and Slicer	3,007 32
" " " blacksmith	119 63
" " " sail-maker	75 80
" " " ship-joiner	600 13
" " " block-maker	77 86
" " for new boat	20 00
" " " water-casks	18 —
" " " rigging	58 37
" " " ship-chandler	38 10
" " " painting	68 75
" " " "	104 59
" " " man's time	100 —
" " " mate, ½ month	25 —
" " " cook, ½ "	20 —
" " " 3 sailors, ½ "	52 50
Total	$7,171 05
And I do further report that the libellants are entitled to interest on said sum of	$7,171 05
Amounting to	2,300 65
Total amount due libellants	9,471 70

Dated December 3d, 1868.

KENNETH G. WHITE,
U. S. Commissioner.

311 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on Thursday, the 10th day of December, in the year of our Lord one thousand eight hundred and sixty-eight:

Present, the Honorable Samuel Nelson, an associate justice of the U. S. Supreme Court, and judge of the said court.

BENJ. F. TOWN, JOHN T. FOX, FOUNTAIN M. CRANMER, James Anderson, Daniel S. Williams, Mary A. Woolston, administratrix of F. W. Woolston, Charles Allen, Henry Howell, William Lane, Tunis Bodine, and Michael Allen, libellants and appellants,

vs.

THE STEAMSHIP WESTERN METROPOLIS; HIRAM BENNER, Samuel Brown, and others, claimants & appellees.

On reading and filing the report of Kenneth G. White, esq., United

States commissioner, to whom the above matter was referred, by which there is reported due the above libellants and appellants for damages by collision, with the interest thereon, the sum of nine thousand four hundred and seventy-one $\frac{70}{100}$ dollars, and no exceptions having been filed to said report:

312 Now, on motion of D. &. T. McMahon, proctors for the said libellants and appellants, it is ordered that the said report be, and the same is hereby, in all things confirmed, and that the said libellants & appellants recover in this action against the said steamship Western Metropolis, her tackle, engine, apparel, and furniture, the amount reported due, together with their costs in the district court and also in this court, to be taxed, and that said steamship Western Metropolis, her tackle, apparel, and furniture be condemned therefor.

And on like motion of D. & T. McMahon, proctors for the libellants and appellants, it is further ordered that unless an appeal be taken to this decree within the time limited and prescribed by the rules and practice of this court, that the stipulations and bondsmen on the stipulation and hand given by the claimants on filing their claim and bonding said vessel, perform their stipulation and bond.

And on like motion, it is further ordered that out of the proceeds of the stipulation and bond of the claimants for costs and value, to be paid into the registry of the court, the clerk of this court pay to the proctors for the said libellants and appellants the amount reported due, together with the costs to be taxed as aforesaid, after deducting the taxed costs of the officers of this court.

S. NELSON.

313 To the Supreme Court of the United States:

The petition of appeal of Hiram Benner & Lemuel Brown, claimants of the steamer Western Metropolis, her tackle, &c., respectfully shows:

That on the thirteenth day of April, 1864, Benjamin F. Town, John F. Fox, Fountain Cranmer, James Anderson, Daniel S. Williams, Mary A. Woolston, Charles Allen, Henry Howell, William Lane, Tunis Bondure, and Michael Allen, claiming to be the owners of the schooner "Mary T. Town," filed their libel in the district court of the United States for the southern district of New York, setting forth that the said schooner Mary T. Town had been sunk in the Potomac River in consequence of a collision with the steamer Western Metropolis, by the fault of the Western Metropolis, and prayed that the said steamer might be arrested and condemned therefor.

That the appellants, Hiram Benner and Lemuel Brown, duly appeared and claimed said steamer Western Metropolis, and duly answered

314 therein. That such proceedings were thereupon had, that after a trial, the district court did, on the 18th day of July, 1867, decide and decree that the libel filed in the said cause should be dismissed with costs, the court holding that the schooner Mary F. Town, and not the steamer, was to blame.

That thereafter, on the 26th day of July, 1867, the libellants, Benjamin T. Town and the other libellants hereinbefore named, duly filed a notice of appeal, and afterwards perfected said appeal to the circuit court of the United States for the southern district of New York.

That such proceedings were thereupon had that the said cause was heard upon the same pleadings and proofs as in the court below, and on the ninth day of October, 1868, the said circuit court of the United States for the southern district of New York did order and direct that

the decree of the said district court should be reversed, and the libellant recover their damages sustained by the collision.

That such proceedings were thereupon had, that by the final decree entered on the fourth day of December, 1868, the said circuit
315 court did adjudge and decree that the libellant should recover the sum of nine thousand four hundred and twenty-one $\frac{70}{100}$ dollars against said steamer Western Metropolis, her tackle, &c.

That the said appellants allege and insist that the said decree is erroneous, and should be reversed and annulled, and that the said decree of the district court should be affirmed, and that the libel should be dismissed.

Wherefore the petitioners pray that the Supreme Court of the United States may proceed to hear the said cause anew on the pleadings and proofs already in, and such other proofs as may be offered herein, and to reverse and annul said decree, and to restore the appellants to all that they have lost herein.

BEEBE, DONOHUE & COOKE,
Proctors.

316 (Indorsed:) U. S. Supreme Court. Benjamin F. Town & others, appellees, vs. the steamer Western Metropolis, &c. Hiram Benner & an'r, appellants. Petition of appeal. Beebe, Donohue & Cooke, proctors.

Filed Dec. 12, '68.

We admit due service of the within petition of appeal.
Dec. 12, '68. D. & T. McMAHON,
Pr. Lib't.

317 Circuit court of the United States of America for the southern district of New York, in the second circuit.

BENJAMIN T. TOWN *et al.*, lib'l'nt & appellant,
vs.
THE ST. WESTERN METROPOLIS, HER TACKLE, &c.; , cl'nts & appellees.
} Bond for costs.

Know all men by these presents, that we, Hiram Benner, and Lemuel Brown, William Pinckney, E. R. Secomb, Nathaniel Griswold, and George Griswold, are held and firmly bound unto the above-named cl'm'ts & appellees in the sum of eighteen thousand dollars, to be paid to the said cl'ts & appellees; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the fourth day of Dec'r, in the year of our Lord one thousand eight hundred and sixty-eight. Whereas the above-named lib'l'ts & appellants have prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the south'n district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named bounden shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HIRAM BENNER. [L. S.]
WM. PINCKNEY. [L. S.]
LEMUEL BROWN. [L. S.]
E. R. SECOMB. [L. S.]
NATH'L G. & GEO. GRISWOLD. [L. S.]

Sealed and delivered, and taken and acknowledged, this 4 day of Dec'r, 1868.

A. W. HALL.

318 UNITED STATES OF AMERICA,
Southern District of New York, ss:

William Pinckney & E. R. Secomb, being severally duly sworn, depose and say, each for himself, that he is worth the sum of eighteen thousand dollars over and above all his just debts and liabilities.

WM. PINCKNEY.
E. R. SECOMB.

Severally sworn to this 4 day of Dec'r, A. D. 1868, before me.
[L. S.] A. W. HALL,
Notary Public, N. Y.

I approve of the foregoing bond as to its form and amount, and the sufficiency of the sureties.
Dec'r 12, 1868.

SAM'L BLATCHFORD, *D. J.*

(Indorsed:) Vol. . Page . United States Supreme Court. Benj. F. Town & o'rs, lib'l't & appellees, vs. the st'r Western Metropolis, her engine, &c.; Hiram Benner & al., cl'ts & appell'nts. Bond for costs on appeal. Beebe, Donohue & Cooke, app'l'ts' proctor.

Approved: D. & T. McMAHON.

Filed this 11 day of Dec'r, 1868.

319 By the Honorable , one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to Benjamin F. Town, John T. Fox, Fountain M. Cranner, James Anderson, Daniel S. Williams, Mary A. Woolston, Charles Allen, Henry Howell, William Lane, Tunis Bodine, & Michael Allen:

Whereas Hiram Benner & Lemuel Brown, claimants of the steamer Western Metropolis, lately appealed to the Supreme Court of the United States from a decree rendered by the said circuit court of the United States for the southern district of New York, made in favor of you, the said Benjamin F. Town, John F. Fox, Fountain M. Cranmer, James Anderson, Daniel S. Williams, William Lane, Tucnis Bodine, & Michael Allen, Mary A. Woolston, Charles Allen, & Henry Howell, as libellants and appellants against the steam. Western Metropolis, her engine, &c., of which vessel the claimants & appellants, Lemuel Brown & Hiram Benner, are the owners, and have filed the security required by law:

You are, therefore, hereby cited to appear before the said Supreme Court of the United States at the city of Washington, on the first Monday of December next, to do & receive what may appertain to justice to be done in the premises.

320 Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the eleventh day of December, in the year of our Lord one thousand eight hundred and sixty-eight, & of the independence of the United States the ninety-third.

SAM'EL BLATCHFORD.

(Endorsed:) B. F. Town v. the str. Western Metropolis, &c., cl'nts & app'l'ts. Citation.

We admit due service of the within citation.

Dec. 12, 1868.

D. & T. McMAHON,
Pr. Cl'nts.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 320, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Benj. F. Town et al., lib'l'ts & appellees, against the ship Western Metropolis, her tackle, cl'm'ts & app'l'nts, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 20 day of Dec'r, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the said United States the ninety-third.

[SEAL.] KENNETH G. WHITE, *Clerk.*

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IN ADMIRALTY.

SUPREME COURT OF THE U. S.

ON APPEAL FROM THE

UNITED STATES CIRCUIT COURT, S. D. OF NEW YORK.

STEAMSHIP WESTERN METROPOLIS, BENNER & BROWN,
Claimants and Appellants,
vs.
THE SCHOONER MARY C. TOWN, BENJAMIN F. TOWN, et al.,
Libellants and Appellees.

Brief of Counsel for the Mary C. Town.

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STATEMENT OF THE CASE.

On the night of February 10, 1864, at about ten minutes before 8 o'clock, the Schooner Mary C. Town, with all sails set, fully equipped and manned, while proceeding down the Potomac River, was run against and sunk by the Steamship Western Metropolis, going up the Potomac, on a course opposite or nearly so to that of the Schooner. After sinking the Schooner, the Steamer, paying no attention to her, went on her way about five miles above, and anchored for the night. The Schooner was eventually raised at a great expense. Suit was brought in the U. S. District Court, for the Southern District of New York, to recover the damages.

The District Court dismissed the libel with costs, see decree (fol. 293). But on appeal to the Circuit Court, (Nelson, C. J.,) the latter reversed the said decree, and found in favor of the libellants, the owners of the Mary C. Town. On this last named decree judgment was finally entered, in favor of the owners of the Mary C. Town, for $9,471 $\frac{70}{100}$ damages and costs. From the decree of the Circuit Court, the owners of the Steamship have appealed to this Court.

In the libel, the following faults are charged against the Steamer, viz:

1st, That the Steamer did not keep on her original course, but kept closing in on the track of the Schooner, so that she was aiming in a direction to cross the Schooner's bows.

2d, When five hundred yards off and so closing on the Schooner's course, the Steamer suddenly blew one whistle —a signal usually given to sailing vessels to go to the right—and instead of following her signal. the Steamer starboarded her helm and came right down on the Schooner.

3d, If the Steamer had slowed, stopped and backed in time and ported her helm, instead of starboarding, or had at time of blowing her whistle, ported her helm instead of starboarding, or if Steamer had slowed, stopped and backed in time, or even slowed and stopped her headway a reasonable time before the collision, same would have been avoided.

4th, If the Steamer had refrained from blowing her steam whistle, as a signal to Schooner to go to the right, and had ported instead of starboarding her helm, collision would have been avoided.

It further charges, that besides the aforesaid faults, the collision was the result of—

1. The *inexperience* and *mismanagement* of the Captain of the Steamer, who persisted in starboarding the helm of the Steamship after his mate, who was on the lookout, had warned him it was proper to put his helm a-port.

The libel further avers—

That the libellants' *vessel did not alter her course at all until after the Steamer had blown her steam whistle, and then only to avoid the collision* she put her helm up, the result of which was she came near escaping the blow of the Steamer; but if the Schooner had not done so, she would have hit Steamship and probably sunk *her*.

The answer of the claimants takes issue on the charges of negligence, and alleges that they blew a whistle *as a warning* to the Schooner to call her attention to the Steamer then approaching her; but notwithstanding that warning, the Schooner as she approached the Steamer crossed the track of the Steamer, and although then everything was done, the collision could not be avoided.

There is an entire failure of *statement* in the answer of *what course the Schooner was on*—whether to starboard or larboard of Steamer—before whistle was blown; but they allege the Steamer was on the southerly side of the channel, and had slowed for the purpose of anchoring. They admit the collision took place about the time mentioned in the libel.

Before answering, the claimants excepted to the sufficiency of the libel. These exceptions were argued and overruled by his Honor, Judge Betts, and are reported in 28th Howard, N. Y. Supreme Ct., Pr. Reps., p. 283.

The libellants read the following depositions on the trial, in the District Court, viz:

CHARLES F. LETTS, one of the lookouts, taken on 3d Sept., 1864, p. 64;

JOHN SMITH, another of the lookouts, on the 20th September, 1864, p. 40;

KATZENBERG, the pilot of the Steamer, June, 1865, p. 70;

WM. CLEMENSHAW, the Schooner's cook, Oct. 31, 1865, p. 68;

BAZEL S. WILLANER, then ship carpenter, Dec. 13, 1865, p. 79;

WM. GEARY, a hand on Steamship, on 13th April, 1866, p. 58;

JOHN ROBERTS, a hand on Steamship, on April 17, 1866, p. 45;

EDWARD HILLYER, a hand on Steamship, on April 23d, 1866, p. 74;

A. GARVIN, a hand on Steamship, on May 2d, 1866. p 54.

On the trial in the District Court, the libellants produced and examined—

JOHN T. FOX, the master of the Schooner, p. 10;

GEORGE CLIFFORD, the helmsman, p. 25.

Also divers experts, p. 19, 22, 32, 35, 37.

From all the evidence it is submitted that the following facts are fully proven, or undisputed,—

1. *That the wind was propelling the Schooner seven or eight knots on that night,* (33) and was *blowing from the northward.*

JOHN SMITH one of the Schooner's lookouts, says wind was N. N. W. (101); Captain FOX says wind N. by W. when first seen (33); subsequently he says that this wind was about a-beam on his vessel (35, 228); JOHN ROBERTS, a seaman on the Steamer, says wind was north or north by west (120); GARVIN also (fol. 138).

2. That the tide was ebb, and flowing at the rate of two and a half knots an hour (fol. 97).

3. That the Schooner was coming down the river on a course S. E. by E. $\frac{1}{2}$ east (102). The Steamer going up the river on a course N. W., as the Captain HILTON says (216); or N. W. by W., as JOHN ROBERTS, one of their seamen says (118); or from E. S. E., as Captain FOX says (38). This course would point to W. N. W. Schooner heading S. E. by E., according to Hilton (217, 225).

4. That the Schooner was struck on the port side, abaft of her main chains, and sunk in a very short time (35, 102).

5. That the Steamer went on and rendered her no assistance (106, 136, 149).

6. That the night was sufficiently clear to see objects at the distance off of two miles. The pilot, KATZENBERG, says he saw the Schooner's sails two miles off (178, 122).

7. At the place of collision, the river was five miles wide, or thereabouts (36).

8. No other vessel was in the way.

9. The Steamer was over 2,500 tons burthen (179); The Schooner only 142 tons (51). She carried 250 tons (110).

10. The Steamer was a transport in Government service (16). The Schooner was going down light (32).

11. The Schooner's people saw the Steamer four miles off. The Steamer's pilot saw the Schooner's sails two miles off (178).

12. A whistle was blown by the Steamer as a signal to the Schooner when the latter was a very short distance from the Steamer, 300 to 500 yards. See citations under 3rd proposition.

13. The Schooner at some short period after the whistle was blown, ported her helm.

14. The Steamer, after blowing her whistle or simultaneously therewith, starboarded her helm and then ported it. KATZENBERG thought she had not steerage way.

15. After the Schooner had ported her helm, the Steamer suddenly rung her bell to stop and back her engine. Her engineer says he had got her back three revolutions, and was on the fourth when the collision took place.

16. Between the time the pilot of the Steamer saw the Schooner's sails, say two miles off, and the time the whistle was blown, *the Steamer kept on a direct course for the Schooner, not diminishing her speed, which the libellants' witnesses say was ten to twelve miles an hour. Those on the Steamer say it was five knots per hour.*

The following facts are clearly proven by weight of testimony, though disputed, viz:

1. *The Schooner had at and before the collision a good lookout, who were vigilant and saw the Steamer four miles off.*

On this point CHAS. F. LETTS, mate of Schooner, swears he was on the lookout. He says, (fol. 158,) "I was on the forecastle deck when she struck us". * * I was on the lookout.

He says further: "We were all on deck at the time of collision."

On cross-examination (fols. 163 and 164), he says: "That when he first saw the Steamer she was four or five miles off. He was doing nothing more than on the lookout.

He describes what he did and saw—

SMITH was forward. The forecastle deck is elevated, CLIFFORD at the wheel all the time. CANADA, (another of the men,) was around on the deck. He further describes the Steamer's lights; (fol. 164) shows how she ranged when first seen, and before or at time whistle blew, indicating that he was a competent look-out, and had vessel in view all the time.

On this point, JOHN SMITH, the other look-out, testifies, (fol. 100,) "that, at or before the collision, he was on the look-out, and stationed there for that purpose." He says further, the crew, four men and two officers, were on deck (100). He first saw Steamer four to four and a half miles off (101); goes on and then describes her lights, and shows how she bore at different times up to the collision (fol. 102).

On this point Captain Fox says: (fol. 32) All on deck, except cook; he, witness, was on the quarter near the wheel (32). The two look-outs were on the forecastle deck (32).

The forecastle deck is forward at the bow of the vessel, extending aft about eight feet (33). He then goes on and describes his seeing the Steamer, (fol. 33). Next the report of light ahead—his answer, aye, aye. She was four or five miles off (33). He says when about 600 (fol. 34) yards off she was reported as a steamer.

On cross-examination he (fol. 47) reiterates that LETTS was on the forecastle on the lookout, where he had ordered him; that he saw him there. That LETTS reported to him (fol. 47) twice (48).

He says further, (fol. 48) the man at the wheel said to him once there was a steamer a-head. After the whistle blew he ran forward, and saw LETTS (fol. 48) by the fore-traveller, which was just off the forecastle deck.

On this point, CLIFFORD *says:* (fol. 69) That CHARLES

LETTS had been forward on the look-out for some time before the collision. He was there when he, witness, first saw the light. Witness saw him there ; also SMITH there from 6 to 8 o'clock, (70).

Cross-examined (fol. 74). He says that CHARLES LETTS was on look-out from 6 to 8 o'clock, forward.

It appears further that all sails were set, the boom to starboard, so that the stations of these two men, and of CANADA, the other one, were the best calculated for a general look-out. The fact that LETTS came from the forecastle deck back to his captain to report is strong evidence of his prudence and capacity as a look-out, because the wind was strong and blowing in a direction contrary to his hail, and there was a liability of his not being heard by the steersman or by the captain.

SMITH *shows* (fol. 108) that the other man named CANADA or George was on the main deck to leeward, which completed the look-outs in every part of the vessel.

2d. *The Steamer on the other hand was insufficiently provided in that particular.* For although they had one man stationed on the look-out, yet it appears that but little attention was paid to him, inasmuch as he signalled the Schooner twice before his hail was answered ; some interval of time elapsed between the two signals. When the first signal was made the second mate ran on the forecastle deck and cried out port. This was done. It was the chief mate's watch. He was not around the deck at the time the Schooner was reported. Next, the first mate gave orders and cried out starboard. At that time the Schooner was quite close. The vessel was starboarded, and whistle blown. These witnesses all consider the *collision taking place in consequence of these contradictory orders.*

Geary, fols. 134, 144, 145.

Hillyer, fols. 182, 183, 184.

Jno. Roberts, fols. 113, 115, 120.

A. Garvin, fols. 134, 135, 137.

The latter makes the intervals of time between the two reports three or four minutes (134 and 135).

KATZENBERG, the pilot, admits that the chief mate cried out from the forecastle deck hard-a-port, and he tried to do so, but could not (fol. 176).

The Captain says the Steamer was in charge of the pilot KATZENBERG, *who could not steer the vessel*, and he took his orders from him (fol. 223).

The above statement of facts, and the further statement of KATZENBERG, that he saw the Schooner and her light two miles off, took her to be a vessel at anchor, steered right for her (fol. 175), until having got so close he could not avoid her (fol. 175), added to the captain's taking control of the vessel out of his hands, makes a strong case of fault on the part of the Steamer (fol. 176).

3d. *The courses of the two vessels were such, when they were two miles apart, as that if nothing was done by either, a prosecution thereof would bring them nearly head on.*

The testimony supporting this position is grouped under the first proposition.

FIRST PROPOSITION—The steam vessel must get out of the way of the sailing vessel, and had no right to approach as she did in this case, on that night, so close to the Schooner in question, before taking any precautions.

(*a.*) The proof is very clear by all of the credible witnesses in the cause, that from the time the Steamer was first seen until the whistle was blown, *that the Steamer, although having a broad, navigable channel to move in and manœuver, did not alter her course, until within* 300 *yards of the Schooner, when it was too late for the Steamer to avoid the collision.*

All the witnesses are in accord in that particular.

1st. Those on the part of the libellants thus:

Captain Fox, in his very clear narrative of the circumstances of the collision, describes the Steamer as keeping on a steady course for the Schooner, nearly head to head (33, 34,) for about four miles—so steadily that he wondered on which side of him the Steamer would go, and so remarked to his wheelsman Clifford (33, 34.) He describes

when 300 yards off the whistle was blown, (33 and 34.) At that time he was apprehending trouble and considering what he should do. And understanding the signal to be to go to his right, he acted accordingly, *to avoid the collision.* Up to the time of the blowing of the whistle the Steamer had made no effort to avoid him, (39.)

GEORGE CLIFFORD, the wheelsman, says the same thing distinctly and unequivocally. This witness is very intelligent, (fols. 66 to 70.)

JOHN SMITH, one of the Schooner's lookouts, after describing the course of the two vessels from the time he first saw the Steamer, viz.: the Schooner's course S. E. by E. ½ E., (102.) the Steamer's about N. W., says in another place: The Steamer was coming right up the river on our weather bow, (102.) At the time when the whistle blew the Steamer headed on the Schooner's weather bow, i. e., on the port side, from which side she bore from off on deck. The whistle was blown 4 or 500 yards from the Schooner, (103,) and when 300 yards off he observed the Steamer's port light shut in, (108,) which indicated that they had starboarded their helm. He thinks Steamer's speed was 12 to 14 knots, (103.)

CHARLES F. LETTS, Schooner's First Mate, says: First made Steamer's lights at 4 to 5 miles off—off of Schooner's port bow, (158,) kept her on that bow so that she ranged aft the main rigging to a man standing at the wheel; when 4 or 500 yards off whistle was blown, (158.) He thinks Steamer's speed 10 to 15 knots an hour, (159.) He thinks *even if whistle was not blown and vessels kept their courses that the vessels would have came together,* (160.)

2d. Those witnesses belonging to the Steamer who were examined by the libellants say:

GARVIN says: The whistle was blown by the Steamer when both vessels were apart 3 or 400 yards, (135.) The Schooner at that time bore ahead a little on the starboard bow of the Steamer, (136.) Up to this time the Schooner had not changed her course. Up to that time Steamer was going about half speed—4½ to 5 knots, (137.) The only change in the Steamer's course that he speaks of was after the whistle was blown, (136.)

JOHN ROBERTS says: The whistle was blown when Schooner was 4 or 5 ship's lengths off, (116.) He says further: When he first saw Schooner she was one-half to three-quarters of a point off their starboard bow, (117.) The courses of the two vessels, however, were nearly head and head, (117.) When whistle was blown Steamer was going 5 knots, (118.) At the time of the collision the two vessels were heading as follows, viz.: the Steamer heading up the river N. W. by W.; the Schooner heading down the river in nearly an opposite direction, (118.)

WILLIAM GEARY says: The two vessels were 3 or 4 ship's lengths apart from each other when whistle was blown, (148.) Up to that time no change of course on the part of the Schooner, (148.) He says the order to port the wheel of the Steamer was given when the Schooner was 5 *or* 6 *ship's lengths* off from the Steamship, (148.) He says further: The order to starboard was given when the Schooner was only two ship's lengths off.

The whistle was blown after the second report of the Schooner and the porting of the Steamship's helm. The Schooner did not port her helm until after the whistle was blown and the two vessels were closing in on each other—say, "perhaps 3 or 4 ship's lengths off," (148.)

EDWARD HILLYER, a seaman on the Steamship, speaks of the two vessels coming stem on at the time the second mate cried, "Port, port," (182.) Then he heard, "Starboard, starboard," (183.) cried out. A whistle was then blown, (183.) He looked out and saw the Schooner about two of the ship's lengths off, (183.) Then the Schooner ported her helm, (184.) In a few minutes they were together, (184.) He says, further, if the Schooner had not kept away after the Steamer starboarded her wheel the vessels would have come together, (185.) He says when the Schooner was first reported she was six times her length off, (186.)

On cross-examination he says: When I first saw the Schooner she bore directly stem to stem, (190.) The Schooner continued to bear so until the second report of "sail ho" was made and the Steamer ported, (190.) Then she appeared 1½ points on the Steamer's port bow, (190.)

This was three times her own length off then from the Steamer, (190,) and when whistle blew she was twice her own length off, (191.) The Steamer changed about 1½ points on our port helm, (191.)

KATZENBERG, their pilot, says: We made a light ahead; the Schooner's light; thought it was a vessel anchored, (175.) *we steered right for her*, (175.)—for the light—until we discovered her sails, (175.) then the Steamer had got near her; he put his helm hard a-starboard; our Captain went into the pilot-house and blew a long blast, (175); this was to keep to her right; the chief officer cried out, "hard a-port," but the ship had no way on her and did not answer the helm, (176); the sailing vessel then could not get out of her way, (176); Schooner seemed about 300 yards off when the whistle was blown, (177); prior to that there was no change in the course of the Schooner, (177); he says *it would have been a very tight rub for each vessel to have avoided the other*, (178.) not over 200 yards distance; he says that when whistle was blown, if he had put the helm hard a-port, the collision would have been avoided, (178); when he first discovered the Schooner's sails she was two miles off, (178); at that time they were heading right for her; *had her a little open on her starboard bow—just enough to see the light*, (178); *could see Schooner's port bow first.* (178); when he put his helm hard a-starboard was 2 to 300 yards off, (178.)

All these were witnesses introduced by us.

Their testimony taken by the claimants, *de bene esse*, materially corroborates the above.

THOMAS WOOD says the whistle was blown twelve minutes before the collision, (234); could not say if the Schooner had altered her course before whistle was blown, (234); he was too far off to see it; the Steamer did not change it up to the time, (234.)

WILLIAM KAIN, the Quartermaster, says: The Captain blew steam whistle; then Schooner kept away, (276.)

On cross-examination he says he put the *wheel hard a-starboard*, by the Captain's orders, after the whistle was

blown, (286.) He says from the time he first laid eyes on the Schooner until the collision it was *very short*, (and, although pressed to tell the time, would not do so,) and the distance very short, (286.)

This witness, though pressed, seemed to have no memory about anything, nor any knowledge about time or place, yet he unhesitatingly conceded *that the vessels were a short distance apart* when the whistle was blown, and until it was blown the Schooner did not change her course, (286, 287.)

The testimony on the trial, by the claimants, still further corroborates this proposition.

The Engineer's testimony, (fol. 209,) is that the bells were all rung together, as quickly as they could be sounded. (This is an indication of suddenness and unpreparedness.) The engine was reversed immediately, and before it could make more than three turns back the jar of the collision was felt.

COWEN says the Schooner was probably a quarter of a mile off from the Steamship when he first saw her—*very close indeed* when the Schooner ported her helm—about 300 feet off, (215.)

HILTON says, (220, 221,) on cross-examination, "not a great while before the collision when he first saw the Schooner; *only a short time;* not a great ways off when Schooner changed her course;" (but he would not give distance nor time.)

All of this testimony shows that the Steamer approached too near to the Schooner without taking any measures to avoid collision, and when almost upon the Schooner blew her whistle and put her helm to starboard, and endeavored to check her headway. *This risk the Steamer had no right to impose on the Schooner, and is chargeable with the consequences that ensued therefrom.* This testimony is referred to by Judge Nelson in his opinion at Circuit, (see Post, fol.)

The following cases are directly in point, and establish the principle that "the Steamer had the power to have

passed at a safe distance, and had no right to place the sailing vessel in such jeopardy that the error of a moment might cause her destruction; and if an error was committed under those circumstances it was not a fault."

Reed *vs.* the New Haven, 18 Howard, N. Y. Sup. Ct. Rep., p. 491.

Affirmed on appeal by Justice Nelson. (See p. 492 of same book.)

The Genesee Chief, (12 Howard's U. S. S. C. R., p. 463.)

In the Ottawa (3 Wallace, p. 274) the Court say: "A change made at the moment of collision is not a fault which will avail the other party."

Haney and others *vs.* Baltimore S. P. Co., 23 How., p. 287.

In the N. Y. & Liverpool S. S. Co. *vs.* Rumball, 21 Howard, p. 371, the Court quotes with approbation the observations of the Court in Steamer Oregon *vs.* Rocca, 18 Howard, p. 570, that where a steamer approaches a sailing vessel the steamer is required to exercise the necessary precaution to avoid a collision; and if this be not done, *prima facie the Steamer is chargeable with the fault.*

The Steamer Louisiana, 21 How., p. 1, is in point also.

SECOND PROPOSITION.—The schooner on the night in question *kept her course* until the danger of a collision was imminent, when a whistle was blown and she ported the helm *in obedience to the signal, solely to avoid the collision.*

In the libel, the libellant distinctly avers in the fourth allegation thereof, that the libellant's vessel did not alter her course at all until after the Steamer had blown her steam whistle, and then only to avoid the collision she put her helm up, (fol. 5,) the result of which was she came near escaping the blow of the Steamer; but if the Schooner had not done so, she would have hit the Steamship and probably sunk her.

(a.) All the testimony on this point seems to be in accord, viz.: that there was *no change in the course of the Schooner* until after the whistle was blown.

1. Captain Fox so says, (fols. 33, 34, 39.)
2. George Clifford so says, (fol. 67.)

3. JOHN SMITH so says, (fols. 102, 103.)
4. CHARLES F. LETTS so says, (fol. 160.)
5. GARVIN, Steamer's hand, (fol. 136.)
6. JOHN ROBERTS so says, (fol. 117.)
7. WM. GEARY so says, (fol. 148.)
8. EDWARD HILLYER so says, (fol. 184.)
9. LEON KATZENBERG, pilot, so says, (fol. 177.)
10. KAIN, Quartermaster, (fol. 291.)
11. THOMAS WOOD, (fol. 234.)

The only witness who endeavors to discredit this is the *first mate of the Steamship*. But his evidence is contradicted by the seamen from his own vessel and from its own inherent incredibility.

Captain HILTON says that the Schooner was yawing about a good deal, such as Schooners usually do, before he blew his whistle; but the import of his testimony is, there was no decided change of course until after the blowing of the whistle. (Fols. 224, 225.)

Captain FOX when recalled denies this, (fol. 227.)

(b.) It is submitted that it is perfectly immaterial whether the whistle be a *signal to go to the right or not*. It is *incumbent on the claimants* to make out that it is such a signal as that any coaster sailing on the Potomac *at that time* would have understood it to have been *an alarm*. This the claimants have failed to establish. Their proof merely goes to the practice among captains of steamships navigating the ocean to give such alarms, whilst the libellant's proofs are clear that such a signal on the Potomac means to go to the right.

THIRD PROPOSITION.—The Schooner, were no whistle blown, would not have been bound to have gone any nearer than she did to have avoided the collision.

Every one of the intelligent witnesses put the proximity of both vessels to each other as three hundred yards off when the whistle was blown—some a little over that and some a little under.

Captain Fox, about 300 yards, (fol. 38.)
John Smith, about 400 to 500 yards, (fol. 102.)
C. F. Letts, about 400 to 500 yards, (fol. 158.)
George Clifford, about 300 yards, (fol. 66.)
Clemenshaw says about 100 yards off, (fol. 168.)
Garvin, about 300 to 400 yards, (fol. 135.)
Wm. Geary, three to four ship's lengths apart, (fol. 148.)
Ed. Hillyer, two ship's lengths off, (fol. 183.)
Katzenberg, the pilot, 300 yards, (fol. 177.)
John Roberts, four or five ship's lengths off, (fol. 116.)
Wm. Kain, a very short distance and time before collision, (fols. 286, 287.)
Cowen says three hundred feet off when she ported her helm, (fol. 215.)

It appears by the testimony of Captain Cranmer, (60,) that 300 yards apart was too near to be safe to avoid the collision. So the Captain Fox thought, also—whose narrative on this point is very lucid, (34.)

By looking at the 5th proposition, there will be found a calculation of the shortness of the time it would take to go this distance—showing that the Steamer went too near.

FOURTH PROPOSITION.—Even were no whistle blown and helm ported, such was the proximity of the two vessels and such were their courses, *that a collision was inevitable.*

(a.) The evidence of the inability of the Schooner's people to avoid the collision, *or of their honestly believing that they were unable to avoid the collision*, (for that is all they are required to show,) is as follows :

Captain Fox says, fol. 34 : "I knew it was not my duty to alter my course, and did not until I saw it was the only remedy I could do to save the vessel, and I did as he directed me, by blowing one whistle, which if he had not done, I should hardly have known on which side of him to go or to try to go, as there was no chance then for us to have cleared him. * * * * As she blew her whistle we kept off about three points ; we did so to avoid the collision." On p. 3, fol. 38, he says :

Q. What did you anticipate trouble about?

A. I was confident the Steamer would strike us if we kept our course. He continues, and says: "At that time Steamer was coming from E. S. E., about one point or so on our weather bow. If we had both kept our course we would have come very near head and head."

On cross-examination, he says:

Q. And in following the signal by porting, you did it simply to *avoid a collision which was then, in your judgment, imminent?* (42.)

A. Yes, sir.

Q. Would you have done it under any other circumstances?

A. No, sir.

Re-cross. He says that if both courses were continued the Steamer would have hit Schooner head and head, the Schooner either striking Steamer near her wheel or the Steamer striking the Schooner's port bow, (fol. 57.)

GEORGE W. CLIFFORD says, p. 26, (fol. 67.)

Q. Suppose you had both kept your courses, and there was no whistle blown, how near would you have come to each other?

A. We would have come into one another head and head.

On p. 28, (fols. 71 and 72,) on cross-examination, he says, in answer to a series of questions, when he saw the Steamer nearly three or four miles off she was bearing to Schooner nearly head and head, and if neither vessel had changed their course they would have come together head and head. If the Steamer had not whistled, but starboarded her helm, she would have struck Schooner forward, i. e., provided Schooner had done nothing but kept her course, (72.)

On p. 29, fol. 72. Q. Your recollection is now distinct, that from the time you first saw the vessel, up to the time the whistle was given, if neither vessel had done anything there must have been a collision?

A. Yes, sir.

Q. And the vessels come near head and head?

A. Yes, sir.

He says further in answer to some questions: Their courses were very near direct head and head toward each other. To be exact, the Steamer was a little on the Schooner's weather bow. Their courses were head and head, and such as were directly opposite each other.

HILLYER says, (fol.) that he saw nothing the Schooner could have done to have avoided the collision, even if the Schooner had not kept away, the two vessels would have come together, (185.)

HILTON admits that a very short time elapsed after seeing Schooner, before the collision, (220.)

JOHN SMITH says, (fol. 104.)

Q. Suppose the Steamer had not blown her whistle, but had kept her course to the N. W., and the Schooner had not ported her helm, had kept her course, would the collision, in your judgment, have taken place?

A. No, sir, I don't believe it would, *it would have been a narrow escape.* * * * * *It would have been pretty close work.*

CHARLES F. LETTS says (fol. 160.)

Q. You stated before that the Steamer after blowing her whistle went contrary to her signal, that is, she kept away too. Suppose she hadn't done that, would the collision have occurred?

A. She would have struck us foward, if she had not blowed her signal—and this he says whether she blew her whistle or not.

KATZENBERG, the pilot of the Steamer says, (fol. 177,) that supposing that neither vessel had altered her course, they would have come very close together.

It is apparent, therefore, from the above testimony, that the master of the Schooner was justified in believing a collision was imminent, and in porting his helm to avoid a collision, and, as is said in the propeller Genesee Chief, 12 How., U. S. S. C. R., p. 463: "We do not deem it material to enquire whether the order of the captain of the sailing vessel at the moment of the collision was judicious or not. He saw the Steamer coming upon him. Her speed was

not diminished, nor any measures taken to avoid a collision; and if, in the excitement and alarm of the moment, a different order might have been more fortunate, it was the fault of the Steamer to have placed her in a situation where there was no time for thought, and she is responsible for the consequences.

FIFTH PROPOSITION. — Whether the whistle be treated as a proper signal or not, the Steamer had no right to impose on the Schooner an obedience to it, even though sanctioned by custom, the existence of which is doubtful.

The rules as to whistles are definite and fixed by the Supervising Inspectors, a copy of which is handed up to the Court. By those rules, which *in terms are made applicable to steamers meeting each other*, one whistle is a signal to go to the right, and two to the left. Therefore, if the Schooner on this occasion saw fit to obey that signal thus imposed on her by the Steamship, it does not rest with the latter to set up that as a fault on the Schooner.

LEWIS says it was improper to blow such a whistle, (fol. 57.)

CRANMER, same thing, (fol. 63.)

DAGGETT says it was not good seamanship to whistle, (fol. 200.)

ELLIS, (fol. 203.)

GLOVER, do., (fol. 205.)

HILTON says it is not good seamanship to blow a whistle to a canvas, (fol. 217.)

The blowing of a whistle by a steamship to a sailing vessel is, in the absence of positive rule, an uncertain signal, of itself; it has no meaning, unless you apply to steamships meeting sailing vessels, the rules only provided for in cases of two steamers meeting each other.

According to the claimants' testimony it depends *on the length of the blast* as to its meaning—a very unreliable test, (fols. 203, 206, 200, 201.)

Libellants' witnesses prove that a long blast means to go to the right, (fols. 87, 83, 86, 91.)

There may be a great propriety in establishing this rule as between steamships and sailing vessels *in cases of emergencies*, and probably the proof in this case is sufficient to that extent of the existence of such a custom, viz.: only existing in cases of emergency. This appears to be the case from the testimony of our witnesses who were examined on that point, and also by their witness GLOVER.

See N. Y. & Liverpool S. S. Co. *vs.* Rumball, 21 How., p. 372, wherein the Court quote the observations of the Court in the Steamer Oregon *vs.* Rocca, 18 How., 570.

This authority places the risk of determining the proper course upon the Steamer, therefore whether rightly or wrongly, having determined it necessary to blow a whistle, the Steamer would be estopped from complaining of its being strictly followed by the sailing vessel. If the sailing vessel did not follow it, as she understood it, it would be fault on her part.

It is claimed, however, that the whistle was merely an alarm. If the claimants' story is true, viz.: that the *Schooner would have passed, as the captain says, a respectable distance to the windward of the Steamer*, (224,) *why blow the alarm? His blowing it shows that he apprehended danger*. Who put him in that danger? It was his approaching so near with his Steamer.

On the subject of what amounts to an alarm, all the expert witnesses differ. The libellants' experts do not consider one long blast an alarm, only four or more short blasts; while on the other hand the claimants' experts think the blowing of *that long blast means an alarm, or to keep her course.*

It is evident, therefore, that whether you take one acceptation or the other, the signal was an improper one to make.

And the claimants cannot impose on us as a fault the fact that we understood the signal to be such as was practised at that time in those waters.

SIXTH PROPOSITION.—The Schooner was justified in changing her course at the time she did, as an effort to avoid the collision pending and threatening her.

CRANMER approves of this as an effort to avoid the collision, (fol. 60.)

GLOVER says same thing in effect, (fol. 205.)

The authorities on this point are distinct.

The Genesee Chief, 12 How., 463, distinctly holds:

That the canvas had a right to keep her course, and also a right, when she had good reason to apprehend a collision, as the Steamer had taken no means to avoid it, to endeavor herself to escape from it; and if, in making such an attempt, when peril was threatening, she did not adopt the most judicious course, such an error of judgment would not be charged against her as a fault.

In the same Court, in the case of Haney *vs.* Baltimore Steam Packet Co., 23 How., p. 287, Judge Grier refers to the pretences set up of the Schooner suddenly changing her course, and running under the bows of the Steamer.

In Steamer Oregon *vs.* Rocca, 18 How., p. 567, opinion 572, the Court say:

"The rule of this Court is, when a steamer approaches a sailing vessel the steamer is required to exercise the necessary precaution to avoid a collision; and, if this be not done, *prima facie* the steamer is chargeable with fault"

The distance between the two vessels when the whistle was blown was so small, whether it be considered 300, 400 or 500 yards, or five ship's lengths or two ship's lengths, that the captain of the Schooner, Fox, was fully justified in apprehending a collision and in porting his helm, irrespective of any whistle. The Schooner was going eight knots an hour, light, the Steamer five knots an hour, half speed. This was a conjoint speed of thirteen knots an hour. If the distance be taken at 300 yards, both vessels would have gone that in less than a minute. If it be taken at 500 yards it would take only about one and a quarter minutes to go that distance.

Now, we do not wish the Court to understand that there is any absolute certainty in these distances or times, as testified. They are merely matters of approximation. The distance was so short, the time so short, that KAIN, their quartermaster, very properly declines to give any

other estimate of the one or the other, excepting that the *time was very short*, (286,) and the *distance very small*, (287.) Captain HILTON *says the same thing*, (220, 221); and COWAN says not over three hundred feet off, (215.)

Now, if the estimate of those on the Schooner as to the speed of the Steamer be taken, namely, that she was going twelve to fourteen knots per hour, (103,) it is quite apparent that the conjoint speed of the two vessels being twenty to twenty-two miles, there was really no time for thought, —and the capacity of this Steamer being well known; her tonnage immense—the pilot, KATZENBERG, saying it is over 2,500 tons; the Schooner's tonnage being 142 tons. It is quite apparent, therefore, that the question is not whether in point of fact there was no real danger, but *whether the Captain of the Schooner* was not justified in apprehending, as he avers on the stand, a collision before the whistle was blown.

In the Ottawa, (3 Wallace, 274,) the Court say: "Corresponding charge of the Propeller against the Schooner is, that she did not hold her course; but the latter charge cannot be sustained, because it is not supported by the weight of the evidence, except so far as it relates to the change made at the moment of collision, which is not a fault that will avail the other party. Rules of navigation are obligatory from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain; but they do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable; and are equally inapplicable to vessels of every description while they are as yet distant from each other that measures of precaution have not become necessary."

ADAMS, (258,) Captain HILTON, (224,) COWAN, (213,) and CAIN, (276,) considered that the Schooner's course such as that she would have gone to the windward of the Steamer. While on the other hand, the libellants' testimony considered that the Steamer would have come on them nearly head and head or a little on their larboard bow.

That course would bring the vessels across each other's track at some point of their respective courses. This will be apparent from the diagram which we submit to the Court.

From that diagram it will be seen that treating the Schooner as bound on a course S. E. by E. ½ E., as testified to by the master (Fox) and his witnesses, she would inevitably cross the track of the approaching Steamer if the latter was on the course stated by her Captain, viz; N. W.; or as stated by JOHN ROBERTS, N. W. by W.; or as stated by Captain FOX, from E. S. E., whilst their tracks would thus intersect each other;—to each set of witnesses on their respective vessels they would respectively appear to be on courses thus: To the Steamer's people the Schooner would appear to be in a course which would take the Schooner two or three points off on the starboard bow of the Steamer; whilst to the Schooner's people the Steamer would be on a course which would take her on one or more points off their port bow. Yet, nevertheless, the respective lines of their respective courses would intersect each other, and every moment's navigation brought them nearer each other. This being the case, the testimony of the two sets of witnesses can thereby be reconciled, as was done by Judge INGERSOLL, in Reed *vs.* N. H., 18 How., N. Y. Sup. Ct. R., 483. The duty, therefore, was thrown upon the Steamer to have, in due time, adopted precautionary measures to have avoided the collision.

They ought not to have considered that the Schooner's course was such as could take her at some time two to three points off her starboard bow, being oblivious of the possibility that there might be an intersection of their courses in the meantime, and so considering, have approached so near the course of the Schooner as to have been compelled to have blown an alarm, starboarded her helm and ring her engine bells, all within the distance of three hundred yards, which only took less than a minute to traverse.

SEVENTH PROPOSITION.—Sufficient evidence of a practice, or custom, existing on the Potomac River during the war, has been produced to satisfy the Court that the

fact of mutual debts. There must be a mutual credit, founded on a subsisting debt on the other side, or an express or implied agreement for a set-off of mutual debts." To this point see also *Howe* v. *Sheppard*, 2 *Sumn.*, 412; *Jackson* v. *Robinson*, 3 *Mason*, 138; *Greene* v. *Darling*, 5 *Mason*, 201; *Duncan* v. *Lyon*, 3 *J. C. R.*, 358; *Dale* v. *Cook*, 4 *J. C. R.*, 11, 14.

No equity of set-off, it is said in *Greene* v. *Darling*, attaches to the debt itself. "What is the right of set-off? By our law it is not a compensation, balancing debts *pro tanto*, as in the civil law; but mere matter of defence. It is a *personal* privilege, and not an incident or accompaniment of the debt."

And again: "The right of set-off does not depend upon the mutuality of debts in their origin, as an inherent quality attaching itself to such debts, but upon the situation and rights of the parties, between whom it is sought to be enforced; and whether the suit be at law or in equity, there must be *personal debts existing between them*, and not merely between either of them and third persons." See also, *Hurlburt* v. *Pacific Ins. Co.*, 2 *Sumn.*, 473.

In *Blake* v. *Langdon*, 19 *Verm.*, 485, the court held that a Court of Equity would, *in a case of insolvency*, regard the real parties, those ultimately to be affected by the decree, and allow a set-off of demands in reality mutual, although prosecuted in the name of other persons, nominally interested. But the court said, that equity interferes in such cases, *to prevent* irremediable injustice, and that it was only when the debts were in reality mutual, or to be apportioned, and the party attempting to enforce his claims at law in the name of another only nominally interested, was himself insolvent, that set-off could be allowed.

In *Wallis* v. *Bastard*, 4 *De Gex McN & Gord.*, 257, where the Lord Chancellor went as far as possible, he said, "The principle of set-off is quite consistent with natural equity; and where it can be adopted, it is an arrangement which this court will be very ready to assist, while it will look to any circumstances that occurred at the time when persons became reciprocally indebted, in order to say that a set-off *did in fact* take place."

The case of *Dade* v. *Irwin's Executor*, 2 *Howard*, 391, settles this, for there this court said that courts of equity do not act upon the subject of set-off in respect to distinct and

unconnected debts, unless some other peculiar equity has intervened, calling for relief. The party had a remedy at law, it was said; and so Jones has in this case; and there was no suggestion of insolvency; nor is there here any pretence that Andrews is insolvent. So that here as well as there, "the bills steers aside of the assertion of any equity upon the foundation of which it can rest for its support." See also *Brewer* v. *Norcross*, 17 *N. Jers. Eq.*, 225.

A claim for damages, growing out or connected with the same transaction, may be *recouped*, as in a suit by a carrier against a consignee for freight, the latter may recoup a claim for damages for the carrier's breach of his contract. *Snow* v. *Carruth*, 1 *Sprague*, 324; and loss or damage accruing from crime or negligence of a seaman may be recouped against a claim for wages. *Thorne* v. *White*, 1 *Peters*, *Adm. R.*, 168.

For in the former case, the defence shows that the carrier is not *entitled* to what he claims, because he has not faithfully done that for which he was to be paid; and in the latter it shows that the seaman is not entitled to his wages, because, instead of serving, he has injured his employer.

But the common law has never allowed a claim for unliquidated damages, arising out of another transaction, to be the subject of set-off. The cases in which that has been held are too numerous and too well known to need to be cited. But see, *De Tastet* v. *Crousillat*, 2 *Wash. C. C.*, 132. *Homas* v. *McConnell*, 3 *McLean*, 381.

In *Ranson* v. *Samuel*, 1 *Craig & Phil*, 161, it was attempted to set-off damages arising from breach of contract and fraudulent misrepresentation, &c., against damages for breach of an agreement to accept, for which suit was pending at law. The court said "this court has no jurisdiction over the subject matter of the action; it cannot try the damages sustained by the breach of the contract, that must, at some time, in some shape or other, become the subject of an investigation at law."

The counsel for the plaintiffs argued that it was no objection to the claim of set-off in equity, that one of the demands was founded in tort, and the other in contract; because *when once a judgment is recovered*, in an action for damages, the amount of such damages constitutes a mere civil demand, although the ground of the judgment is a tort.

That is true, *when judgment has been recovered*, but none had been recovered in that case, and Jones has none in this. He has not even instituted a suit at law.

The argument of Mr. Wigram shows the meaning of the phrase that the demands must be *connected*. In *Beasley* v. *D'Arcy*, 2 *Sch. & Lef.*, 403, *n*, in ejectment for non-payment of rent, credit was allowed for damages caused by the cutting of timber by the landlord; but these damages had been ascertained and fixed by a jury, in a suit at law. In *Piggott* v. *Williams*, 6 *Madd.*, 95, a solicitor filed a bill against his client, to foreclose an estate pledged as security for costs. The client, by cross-bill, alleged that nothing was due, for the costs would have been avoided, if the solicitor had conducted himself with integrity, skill and attention. The court said "the course which the cause would probably take in this case, would be to retain the bill until an action for damages were tried; but there is here, taking the facts for true, a clear case of equitable set-off."

The Lord Chancellor said, "It was said that the subjects of the suit in this court, and of the action at law, arise out of the same contract; but the one is for an account of transactions under the contract, and the other for damages for the breach of it. The object and subject matters are, therefore, totally distinct; and the fact that the agreement was the *origin* of both, does not form any bond of union for the purpose of supporting an injunction. *In the present case there are not even cross-demands*, as it cannot be assumed that the balance of the account will be found to be in favor of the defendants at law." The relief sought was denied. See also *Schermerhorn* v. *Anderson*, 2 *Barb. Sup. C.*, 584.

In *Hepburn* v. *Hoag*, 6 *Cowen*, 615, under a statute which extended the doctrine of set-off, by the insertion of the words "or have demands arising on contract, or credits against each other." the court held that a party could not have the benefit of uncertain damages by way of set-off, and the rule was declared to be the same in equity.

So also it was in *Ainslie* v. *Boynton*, 2 *Barb. Sup. C.*, 263.

In *Duncan* v. *Lyon*, 3 *J. C. R.*, 353, the chancellor said, after stating the rulle at law, "the same rule prevails in Courts of Equity. The practice may, perhaps, be more liberal in respect to mutual credits, *but there is no case in which a set-off has been allowed, where the demand was for uncertain damages, arising on a breach of covenant.*" The debts, he said, must be of the same kind or quality, and be clearly ascertained or liquidated. They must be certain and determinate debts.

In *U. States* v. *Williams*, 5 *McLean*, 133, damages caused by injury to property were attempted to be set-off against a note. It was deemed sufficient to say that they were unliquidated, and could not be set off.

The judgment obtained by Andrews against Reed & Bryson is not impeachable collaterally by Jones. It conclusively settles that they owe Andrews the amount for which judgment was obtained. It is his right to obtain payment of it by garnisheeing any one who is *their* debtor. Jones does not pretend that he is not so; nor that he could avoid paying them what he owes them, if they had themselves instituted suit against him to recover it. He does not seek, therefore, to avoid paying, to be released from, what he is shown by his own notes to owe *them*. If he could defeat Andrews, if he could have his claim for damages allowed against Andrews, by decree in chancery, his debt to Reed and Bryson would not be lessened or affected by it. As to that, it is only a question to whom he shall pay it, whether to Andrews or to them. Therefore his object is simply to have a decree against Andrews for the amount of his damages, and the garnishment defeated by injunction.

If his claim were against Reed and Bryson, and they were suing him, he *might* recoup his claim for damages against their claim for the rent; but there is no connection between his notes to *them*, and the claim for damages for trespass and tort, and for the value of furniture taken, against Andrews.

According to the ordinary course of a garnishment, the amount of whatever judgment is taken against the garnishee, is credited to him against the claim of his own creditor. To give the relief that Jones wishes here, the court would have, first, to usurp the functions of a jury, and assess his damages against Andrews, and then decree that Jones should have credit for the amount assessed, upon his notes to Reed and Bryson, to be given as if Jones had paid them so much money, or had paid Andrews so much for them.

Certainly we need not argue that a court of equity does not sit to assess the damages caused by a trespass or tort, the subject of an action of trespass or on the case, or to ascertain and decree the value of personal property converted, which could be done in an action of trover or detinue or of trespass. Or, if, as to the furniture, Jones could waive the tort, and sue in assumpsit for the value of it, this demand is wholly unconnected with the demand either of

Andrews or of Reed and Bryson, against him, and it is, moreover, an unliquidated demand.

There is no allegation that Andrews is insolvent, or that there is any obstacle to a recovery against him at law; and it is quite evident that such an action would give adequate relief and compensation. As to the furniture, if there be any cause of action, it is only for its actual value; and as to the expulsion of Jones' family from the house, the damages are merely fanciful and speculative, and only ascertainable in a proper action at law.

We have found no case in which a party made an attempt to set off, even at law, a claim for damages caused by a tort. Certainly it was never before imagined that the experiment could succeed in a court of equity.

ALBERT PIKE,
ROBERT W. JOHNSON,
Of Counsel for Andrews.

BRIEF FOR APPELLANT.

SUPREME COURT OF THE UNITED STATES.

No. 194.

ISAAC J. HOSHALL, APPELLANT,

vs.

EDWARD A. TAYLOR, JOHN H. TRAVERS, JOHN C RATHBONE, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED.

SUPREME COURT OF THE UNITED STATES.

ISAAC J. HOSHALL, APPELLANT.

vs.

EDWARD A. TAYLOR, ET. AL.

APPELLANT'S BRIEF.

This is an appeal from a decree of the District Court of the United States for the District of West Virginia, in a cause in which the appellant was complainant and the appellees were defendants.

The case was a suit in Chancery, the object of which was to set up and assert, on the part of Hoshall, a claim to one undivided sixth part of and in the premises covered by a certain lease made by one Jacob Howell, of the oil and mineral privileges afforded by a tract of land belonging to said lessor; situated in the County of Wood, in said State, and containing 114 acres, and to have such interest assigned to the plaintiff, and an account of the rents and profits realized by the defendants of the working of the oil mines previously thereto.

The bill alleged that on the 25th of January, 1861, the said Howell had, by lease, properly executed, acknowledged, and recorded, demised all of said privileges aforesaid to George J. Weller, Edward A. Taylor and John H. Travers, for the term of twenty-one years and exhibited therewith a copy thereof.

That the said Weller on the 9th of September, 1864, assigned his interest to the said Taylor by written assignment, a copy of which was also exhibited.

That the said Travers, on the 1st of April, 1861, had by written instrument, under seal, assigned to complainant one undivided half of his third interest being one undivided sixth part of and in the said lease, and exhibited a copy of said instrument, and the record thereof.

That, notwithstanding this last assignment, the said Travers, on the 6th of May, 1865, undertook to assign to said Taylor, by deed of that date, one full third interest in said lease, described as all his interest, right, title and estate in the same, and exhibited a copy of

this assignment taken from the record. And the bill charges that at the time of taking this assignment the said Taylor knew and had actual knowledge of the previous assignment of one undivided moiety of Travers interest of one undivided third part of and in said premises and that if this had been otherwise, yet as the assignment to Hoshall was duly recorded according to the statute it affected the said Taylor as effectually as if he had had actual notice, and that said Taylor manifestly attempted a fraud on the rights of the complainant. The bill then alleges that Taylor being the owner of five-sixths or two-thirds and a half of the remaining third, assigned to the defendants Longmore and Rathbone two undivided thirds of said premises, and subsequently transferred all his remaining interest to the defendant Swain, and that all of said parties during their respective interests, had gathered large quantities of oil from the premises, and made large profits from the same, all of which they applied to their own use. The bill charges actual notice on Swain, and that whether he had that or not he was bound to take notice of complainant's Deed of Record. The bill then charges, that these parties, with a fradulent purpose to extinguish complainant's interest cunningly prevailed on Howell to execute to them a new lease of the premises under the pretence that the original lease had been forfeited when in fact there was no clause of forfeiture contained in it, and the only condition prescribed had been performed and so recognized by Howell himself, that the whole was a scheme and a device to extinguish Hoshall's interest, in that they had resorted to it for the purpose of consumating the fraud. It charges that saidparties, standing in community of interest with complainant, could do no act in prejudice of complainant's rights. That they could surrender their own interest only, but not his, and that in taking the new lease they would be regarded as Trustees for his benefit to the extent of his interest. The bill, therefore, makes Taylor, Rathbone and Longmore, Travers and Swain parties defendant and prays that complainant's undivided sixth part in said premises be assigned him, and accounts of rents and profits and general relief.

The defendants, Longmore and Rathbone, answered the bill. They allege that the complainant had been engaged in the rebellion, and was, therefore, incapacitated to sue and they plead this in bar. They admit the lease by Howell, but insist that it was only executed and acknowledged by Howell and by Taylor for the firm of Weller, Taylor & Co. It was a personal lease to Taylor alone, and that Travers took no interest under it, and his assignment to complainant passed nothing. But if mistaken in this they allege that complainant's claim is against the other parties and not against them, as they owned two-thirds of the premises in which complainant had no right to interfere, but must look for his interest in the other third. They admit the taking of the new lease from Howell because, as they say, Howell claimed that the old lease was forfeited, and that this new lease was executed to themselves and Swain to the entire exclusion of complainant. They insist that there was reason to think that the first lease had been forfeited and that they were right in taking the new lease as they did, and enter into a long argument to prove this posi-

tion. They allege that complainant had in fact abandoned his interest, if he ever had any, and could not be entertained now to reclaim it. They insist that if the original lease did convey anything to Travers without his having executed it and if he did transfer one-sixth to complainant, the effect was to constitute a partnership between Weller, Taylor, Hoshall and Travers, and that Taylor, as one of the partners could transfer the entire interest in the leased premises to his alienees. They charge that complainant had authorized Travers to sell his interest in the premises and that Travers did sell in pursuance of such authority and complainant promised to ratify it. And they insist that if they are mistaken in all other positions, yet that they are clearly entitled to two-thirds of the leased premises and that if complainant is entitled to one-sixth, it must come out of the interest last sold by Taylor and not out of theirs.

To this answer the complainant replied generally.

The defendant, Travers, answered the bill admitting the allegations thereof, and denying that he intended to convey the interest of complainant by the deed of 19th of May, 1865, to Taylor and alleging that if so recited it was through mistake.

The defendant, Swain, did not answer the bill or appear in the cause.

The deposition of Travers was taken and filed. He proves the taking of the lease from Howell by Taylor, Weller and himself in 1861, and that he conveyed one half of his third interest to Hoshall in 1861, and the other half to Taylor in 1864. He also proves actual notice upon Taylor of the conveyance to Hoshall at the time of the conveyance to him in 1864, and also that he told Taylor at the time that he had no authority to convey Hoshall's interest. He proves the whole transaction to be a scheme on the part of Taylor, with the aid of a lawyer in Parkersburg to get a transfer of the whole of the outstanding third interest, including complainant's half, or one-sixth. He also proves that the stipulations in the lease as to commencing operations in mining and boring had been fully performed, and so recognized by Howell, and that the reason why the work was interrupted and suspended, was owing to the disturbed state of the country. He declares positively that he never had any authority, written or oral, to dispose of complainant's interest, or that he ever claimed to have it, or that Hoshall ratified what he had done when he informed him.

John Dixon was examined to prove that complainant and other parties had abandoned the works they had commenced on the premises after the United States troops crossed the Ohio River in 1861, and that they never resumed operations afterwards, Also to prove Howell's claim that the lease had been forfeited, and that Longmore and Rathborn commenced work in 1865. He also proved that Hoshall left the premises in 1861, and that he did not see him again until after the war.

Jacob Howell is examined to prove that he regarded the first lease as forfeited for the failure of the parties to prosecute work upon it, and the circumstances attending the new lease to Longmoore, Rathborn and Swain. He testified to other matters not believed to be material to any issue in this case.

The defendant, Taylor, is also examined as to the same matters as Howell. He, himself proved knowledge of complainant's interest in the lease before he purchased of Travers. He proves Howell's claim that the first lease had been forfeited, and the circumstances of the procurement of the second. He states, however, that he did not acquisce in the claim of Howell and never considered the first lease as cancelled until the second was executed. He proves conversation with complainant and promises to ratify the sale of one-third interest made by Travers, although complainant denied that he had given Travers any authority to sell his interest. He proves that complainant told him he had been in the Southern Army during the war. He states that in fact he believed the first lease was forfeited, although it was understood that he made his sale to defendant Swain, and involved himself in the course of his examination, in so many inconsistencies, and contradictions, as to render his testimony of little value in the cause.

George W. Neal, the Attorney who drew the deed from Travers to Taylor for the interest of the former, in the term created by the lease, being one-third part, is examined to prove that he was present at a conversation between Taylor and Hoshall, in which the latter admitted that he had authorized Travers to dispose of his interest in the lease, and promised that after he should have seen and settled with Travers, he would ratify the sale. He does not prove any settlement.

Copies of the first and second leases, and of the several assignments of interest in the former, referred to in the pleadings, are filed as evidence in the cause.

Upon this state of pleadings and proofs, the cause came on to be heard in the District Court, at Clarksburg, on the 6th day of September, 1867, when the Court pronounced its decree, dismissing the bill with costs. And the Court having certified that the matter in dispute exceeded the sum of Two Thousand Dollars, the complainant prayed an appeal to this Court, which was allowed.

And for the reversal of said decree, the complainant will rely upon the following points :

1. That the execution and delivery of the lease from Howell to Welles, Taylor and Travers of the 25th of January, 1861, and it being duly recorded according to the Statutes of Virginia, was sufficient to vest in the said lessees the estate and term thereby created. (Code of Virginia, 1860, page 566 sec. 4, 5, and 7. Code of Virginia, page 558, sec 2d, page 569, sec. 2.) And that it was not necessary that it should have been signed, sealed, acknowleged and recorded as to the said lessees or any of them. (Statute aboved cited· Sicard *vs.* Davis, 6 Pet. 125.

2nd, That the deed of assignment from Travers to Hoshall of the 1st of April, 1861, operated to vest in the latter one undivided sixth part of and in the term created by said lease as tenant in common or co-tenant with the said Taylor, Welles and Travers ; and if the previous relations betwen the said Taylor, Welles and Travers constituted them partners, the assignment to Hoshall *ipso facto* dissolved the co-partnership. (Collyer on Partnership, p. 101, note 1.

3d. That the said Travers having conveyed to Hoshall, by his deed of 1st of April, 1861, one-half of his third interest in the premises, and the said deed of the said Travers to Taylor of the 19th of May, 1864, only purporting to convey to said Taylor the interest then held by the said Travers in the same, being one-sixth only (though falsely described as one-third) operated to convey to said Taylor the interest of the said Travers, being only one-sixth, and not one-third. (Code Virginia, pp. 559, sec. 7.)

4th. That if said deed of Travers to Taylor had purported to convey, not merely the interest of said Travers, but his full third originally derived from the lease from Howell, yet that as it is proven that Taylor, at the time of taking such deed, had actual notice of the previous conveyance from Travers to Hoshall of one-sixth part, he was bound by such notice, and could only acquire by such conveyance the sixth part remaining in Travers. (Baumgardner *vs.* Allen, 6 Munf., 429, 446. Fitshugh & Co. *vs.* Jones, 6 Munf., 83.)

5th. That as the said conveyance to Hoshall was duly recorded as required by the Statute of Virginia, the said Taylor was bound by such recording, and the effect of the same was to prevent the transfer of the interest of the said Hoshall by the said Travers, after that time to any other person. (Recording acts above cited.) and Dick *et al vs.* Balch. *et al* 8th Pet. p. 30.

6th. That the interest acquired by Hoshall under his deed from Travers was one individual sixth part of the term created by the lease, and that when Longmore and Rathburn took their conveyance of two undivided third parts of and in the said premises by the subsequent deed from Taylor, they took the same, subject to the interest of the said Hoshall, and held the same as tenants in common or co-tenants with him and the said Swain according to their respective interests, and that they, no more than the said Swain, can claim to exempt themselves from liability to have partition made of the subject and an account taken of rents and profits received. (Early and wife *vs.* Friend, *et al.* 16 Gratt., 21)

7th. That by the terms of the said lease, and the proofs in the cause, the lease was never forfeited. (Doe. ex Dem. Backover *vs.* Post, 1 Dutcher, 285.)

8th, There could have been no surrender of the original lease by the co-tenants of Hoshall sufficient to divest the title of Hoshall. (3 Lomax Digest, p. 143. Code Va., 1860, ch. 116, sec. 1. p. 558.) Clark vs. Graham 6 Wheat. 577.

9th. The taking the new lease by the co-tenants of Hoshall, he having a community of interest with them, cannot divest the title of Hoshall, and his co-tenants are to be regarded in equity as trustees for him to the extent of his one-sixth, and they must hold the estate created by such new lease for his benefit as well as their own, and give an account of the rents and profits received. Collyer on Partnership, 155 Forster *vs.* Hale, 5 Ves. 308.

10th. That the testimony of verbal authority being given by Hoshall to Travers to dispose of his interest furnished by the evidence of the witness Neale, is of no weight as the statement of Neale is entirely overthrown, both by the testimony of Travers and of Taylor himself;

and if such verbal authority had been given, it certainly would not have authorized the pretended agent to convey by deed; besides it was upon conditions not performed nor alleged to have been. Moreover, Travers does not pretend to convey as the agent of Hoshall, or to transfer his interest. He executed the deed in his own name to convey his own interest in the premises, and no appearance is made in the deed of Hoshall, or of any interest he was supposed to have in the subject. His promise to ratify the deed, if such be proven, was without consideration, and in no manner binding upon him.

11th. The objection that complainant had been in the Southern army during the Rebellion, constitutes no bar to the relief sought by his bill.

GEORGE H. LEE,
Solicitor for Appellant

Supreme Court of the United States.

No. 194.

HOSHALL *vs.* TAYLOR & ALS.

APPEAL FROM DISTRICT COURT OF UNITED STATES FOR DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLEE.

The bill alleges a lease, dated January 25, 1861, by Jacob Howell to Weller, Taylor & Travers, of the oil and mineral privilege in one hundred and fourteen acres of land in Wood county; that Travers assigned one-sixth part of his interest to Hoshall, the appellant, April 1, 1861; that he afterwards assigned his whole interest to his partner, Taylor, May 19, 1864; that the assignment to Hoshall was duly recorded, and gave notice to Taylor, which barred him and prevented his taking a valid title to what had been assigned to Hoshall; that Taylor then assigned two-thirds of said lease to Longmoor & Rathbone, September 7, 1864; that Weller assigned his interest to Taylor, September 9, 1864; that thereafter Longmoor, Rathbone, and Taylor took a new lease from Howell, September 19, 1864; that Taylor assigned his interest therein to Swain, December 30, 1864; that the parties under this last lease had made lagre profits, in fraud of the rights of said Hoshall, of which he prayed an account, and to be decreed to have his share of the leasehold interest, &c.

The answer of Longmoor & Rathbone denies all fraud, and denies that they have received any profits, except two-thirds thereof, to which they were entitled, and that

Swain received the other third, as to which the contest should be between Hoshall & Swain, &c., &c.

Swain is not before the court, process not being served.

The only question is, was decree of dismissal right as to Longmoor & Rathbone.

For the appellees I shall maintain—

1. That the only claim to account is based on the averment that the plaintiff and defendants are tenants in common. No bill lies for account between tenants in common under the laws of Virginia, except the defendants be bailiffs of the plaintiff by contract, or by receiving more than their due share.

Friend *vs.* Early, 16 Gratt. 21, Code of Virginia, ch. 145, § 14, p. 586.

In Henderson *vs.* Eason, 17 Ad. & El. U. S. 701, (70 Eng. C. L. R.,) the court held, that unless rent was *received* by a tenant from another no account lies. But in Friend *vs.* Early the court held, that where either party by contract became bailiff for the other, or where either received more than his just share, an account lies.

In our case, the answer in response to the bill declares Longmoor & Rathbone received only two-thirds of the profits, to which the bill admits they are entitled. There is no proof that they received more. There is neither averment nor proof that they were bailiffs by contract for Hoshall, but rather the contrary.

Hence the bill should have been dismissed for want of proof on which the claim to account rests.

2. There is no claim in equity to be decreed entitled to one-sixth the leasehold interest.

First. Because the remedy is at law, by ejectment for his undivided rights. Code of Virginia, 135, § 9, &c.

Second. The contest as to that interest is between Hoshall & Swain; and Swain not being before the court, being non-resident, the contest cannot be decided.

3. But the bill should have been dismissed, because the

relation of tenants in common never existed between plaintiff and defendants. There is no privity between them. Defendants hold adversely, and plaintiff's remedy is at law.

The old lease under which Hoshall claims was surrendered and abandoned, because Howell, the lessor, refused to deliver possession, and held it forfeited. The new lease was the only one under which the defendants claim, and though fraud is charged, it is denied, and there is no proof.

Now the new lessees hold under a new deed and a new possession. No oil was made but under the new lease.

Howell's Dep., Rec., p. 245.

Hence, though the new lessees may have no good title, yet the remedy for the ouster of Hoshall is at law. There is no privity for account, and the remedy for damages is at law.

Code of Virginia, ch. 135, § 30, *et seq.*

4. But I maintain that Hoshall's claim was originally invalid.

The lease from Howell, January 25, 1861, was to the *firm* of Weller, Taylor & Co. The parties became lessees as partners, and could not be lessees otherwise. An assignment by one partner to a stranger dissolved the firm, and determined the lease. Collyer on Partnership, § 110, and cases there cited, § 113. Hoshall was never a partner in the original firm, and could not *take* an assignment of the interest of a partner, without the consent of the co-partners. He acquired no right as to such co-partners.

5. But if Hoshall did take by assignment, we insist further, that it could only be valid by presuming a consent to admit him into the firm.

And then, we maintain, that his interest ceased—

1st. By his going to the South, engaging in the war, and there remaining until its close. The partnership was at an end. The partners were national enemies.

Collyer on Partnership, § 115, and cases there cited;

U. S. *vs.* Grossmayer, 9 Wall, 72.

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Collyer on Partnership, § 115, and cases there cited;

U. S. *vs.* Grossmayer, 9 Wall, 72.

2d. By so going to the South he dissolved the partnership, which depended upon his associating his labor and capital with that of his co-partners for the business, which was connected with the lease.

Griswold *vs.* Waddington, 16 John., 491.

3d. In his absence the present partners *had* a right to convey the whole interest, and *a fortiori* to surrender it, because abandoned by him. He has no right to complain that they did not hold for him when he abandoned his right.

McCulloch *vs.* Summerville, 8 Leigh, 415.

4th. And this is the more clear when it is noted that Longmoor & Rathbone never acquired an interest until more than three years after Hoshall had abandoned his own interest and left the country.

And when the new lease was taken, in December, 1864, how could fraud be imputed to the new lessees, against the right of an alien enemy? And hence there never was any privity between Longmoor & Rathbone on the one hand and Hoshall on the other.

5th. Hoshall will be presumed to have surrendered his right in the lease.

This will be inferred in equity from circumstances. What are the circumstances?

The interest taken as lessee was for a mineral right. The lessees began and ceased in May, 1861. Howell resumed possession. No claim for three years by any of the partners. Hoshall leaves the country and becomes its enemy; he returns after the war. Can he set up his right in equity after such evideuce of surrender?

Mettert *vs.* Hagan, 18 Gratt., 231; 2 Bl. Com., (underhead of Surrender,) 5 Co., R. 11; 2 Prest. Convey, 138; Preston *vs.* McCall, 7 Gratt., 122; 3 P. Wm's., R. 264; 5 Bing., R. 469.

These authorities all settle that a comfirmation and surrender may be *in pais*, and that circumstances will estop a party in equity to assert a right in the teeth of such acts *in pais*.

6th. The lease was forfeited.

It was a contract resting on mutual covenants as conditions. *Howell* leased a right to be prosecuted to profit. Lessees had no right to hold the interest without working it to the profit of lessees or lessor. A failure to do so entitled Howell in equity to have the lease declared forfeited. As the partners in the country surrendered, and Hoshall abandoned possession, Howell had a right to hold the contract forfeited. Hoshall, by withdrawing from jurisdiction, debarred Howell from enforcing the covenant. Can Hoshall then claim that his right, notwithstanding, was beyond reach of forfeiture?

7th. But Hoshall said after the war he authorized Travers to dispose of his right. Travers did so, and conveyed it to Taylor, saying that he had Hoshall's authority.

Such a contract in writing, though not authorized to be under seal, is sufficient for specific performance under Virginia law, and sufficient to bar Hoshall's claim, made in the face of his valid contract.

McCullough *vs.* Summerville, *supra.*

Travers' deposition cannot be used; it was taken without notice.

J. RANDOLPH TUCKER.